APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr Justice Tottenham.

BENI MADHUB CHUCKERBUTTY (DEFENDANT) *v.* BHUBUN MOHUN BISWAS (PLAINTIFF).* 1890 *January* 8.

Bengal Tenancy Act (VIII of 1885), *s.* 180—*"Utbundi" holding—Right of occupancy.*

Case in which the question as to what is an *utbundi* tenure is discussed.

Where the plaintiff, who had been dispossessed from certain land, claimed a right of occupancy in such land on the ground that he had held it for twelve years continuously: *Held*, that if the land formed a separate holding which he had from time to time cultivated on the *utbundi* system during a period which had covered more than twelve years, cultivation at various times and under separate agreements on each occasion (such periods not being continuous although of the same piece of land), would not confer a right of occupancy on the ground that the first of such periods commenced more than twelve years before the alleged dispossession.

THE plaintiff sued, on the 24th February 1887, to recover possession of a certain piece of land situated in the district of Chupra, from which he had been dispossessed by the defendant, who was the putnidar of the mehal, on the 26th January 1886, the plaintiff claiming to have a right of occupancy therein.

The plaintiff alleged that he had been a settled ryot in the village of Chupra, and had held lands under the *utbundi* system for sixty years, and that the particular land in dispute had been in his possession and cultivated by him under such system for forty years.

The defendant admitted the disputed land was let to, and held by, the plaintiff under the *utbundi* system, and that, whilst the defendant had cultivated the land, he had paid rent for it at *utbundi* rates; but he contended that the plaintiff had not held the land for twelve continuous years, because, during such period of twelve years, part of the land was *potit*, and for such land no rent

* Appeal from Appellate Decree No. 1670 of 1888, against the decree of J Crawfurd, Esq., Judge of Nuddea, dated the 30th June 1888, affirming the decree of Baboo Prossonno Cumar Bose, Moonsiff of Krishnagore, dated the 30th of July 1887.

1890

BENI MADHUB CHUCKERBUTTY v. BHUBUN MOHUN BISWAS.

was paid as long as it remained *potit*. As against this contention the plaintiff stated that from the very nature of *utbundi* lands, it was impossible for a tenant to cultivate the entirety of such holding for twelve continuous years; that he had, as understood by this system of cultivation, paid rent for the whole land during the time at which portions of the land were *potit*, inasmuch as the *utbundi* rate of rent was a higher rate than was payable for other holdings, and that under that system the high rent payable for such lands as were actually cultivated was the reason for no actual rent being made payable for such part of the holding as might be *potit*; and that under that mode of cultivation he was entitled to a right of occupancy.

The Moonsiff found that the land was held and cultivated by the plaintiff for more than twelve years before the date on which he had been dispossessed before portions of the land became *potit*, and twelve years before the date on which the Bengal Tenancy Act came into force; and holding, in accordance with the case of *Premanund Ghose* v. *Shoorendronath Roy* (1), that the period during which portions of the land were *potit* ought to be included in the period of the plaintiff's possession, gave him a decree for possession.

On appeal the District Judge stated the question for decision to be, whether possession of the land during the period portions of the land were *potit*, was with the plaintiff or the defendant? As to this he found that the presumption was that the possession was continuous in the plaintiff, and held that the finding of the Moonsiff, that the plaintiff had obtained a right of occupancy, was correct.

The defendant appealed to the High Court.

Mr. *Woodroffe*, Mr. *Evans*, Baboo *Rash Behari Ghose*, and Baboo *Saroda Prosonno Roy* for the appellant.

The *Advocate-General* (Sir *Chas. Paul*) and Baboo *Kali Churn Banerjee* for the respondent.

Mr. *Evans* for the appellant.—There are no direct decisions as to what the *utbundi* system is, but there are some, which are not however against me, but which amount to only expressions of

(1) 20 W. R., 329.

opinion on the subject of the different Judges which passed them: *Kenny* v. *Issur Chunder Poddar* (1), *Mirzan Biswas* v. *Hills* (2); *Dwarkanath Misree* v. *Noboo Sircar* (3), *Premanund Ghose* v. *Shoorendronath Roy* (4). These opinions are all *obiter*. There is, however, a report on this class of tenures drawn up by Mr. Cotton, which was before the Select Committee when the Rent Act was passed. The words "*continuous years*" in the Rent Act cannot be said to have the same meaning as "twelve years." The plaintiff is not entitled to any occupancy rights. There are grave errors in the trial of this case which require remand. The finding that the holding of the plaintiff extended over twelve years continuously, and that he has therefore obtained a right of occupancy, is based on a misconception of an *utbundi* holding, and on an erroneous presumption that the plaintiff was in possession even in the years when he did not cultivate.

The *Advocate-General* (Sir *Chas. Paul*) for the respondent.—My case is that an *utbundi* holding is a definite tract of land, part of which may be cultivated and part not, but that rent at a higher rate is paid for such portion as is cultivated, to make up to the landlord for the loss of rent for that which is not paid for and not cultivated. Section 180 of the Tenancy Act merely enacts Mr. Justice Jackson's statement of the law in *Premanund Ghose* v. *Shoorendronath Roy* (4). The plaintiff is entitled to an occupancy right in these lands in accordance with the *utbundi* system.

The judgment of the Court (PETHERAM, C.J., and TOTTENHAM, J.) was as follows:—

This was a suit brought by a ryot to recover four bighas of land of which he had been dispossessed by his landlord, the putnidar, and in which he claimed a right of occupancy by virtue of more than twelve years' continuous holding.

It was the case of both parties that the land had been held under the *utbundi* system; and the landlord's defence included these two points: *first*, that the land in question was part of his *khamar* lands held from year to year, in which, by s. 116 of the Bengal Tenancy Act, no right of occupancy can accrue; and

(1) W. R. (1864), Act X, 9.
(2) 3 W. R., Act X, 159.
(3) 14 W. R., 193.
(4) 20 W. R., 329.

1890

BENI MADHUB CHUCKERBUTTY v. BHUBUN MOHUN BISWAS.

secondly, that, if the land was not *khamar*, the plaintiff, an *utbundi* ryot, had never held it for twelve years continuously, and therefore had not acquired in it any right of occupancy.

The first point is settled by the finding that the land is not *khamar*; and with that finding there is no ground for interference in a second appeal. As to the second point, the Court has found that the plaintiff's possession had extended over more than twelve years continuously, and that his right of occupancy had thus become perfect. But it is objected in appeal that this finding is based on a misconception as to the nature of an *utbundi* holding, and on an erroneous presumption that the plaintiff was in possession even in the years when he did not cultivate. It is clear that the lower Court has in fact so held, and that otherwise it could not have come to the conclusion that the plaintiff had acquired a right of occupancy; for s. 180 of the Bengal Tenancy Act prohibits the acquisition of such right in land ordinarily let under the custom of *utbundi*, until that particular land has been held for twelve years continuously. In this respect *utbundi* land is dealt with in the Act differently from ordinary *ryotti* land, in which, by s. 21, a settled ryot has a right of occupancy no matter how short a time he has held possession of it.

Now it is necessary to enquire what this *utbundi* system really is; for there seems to have been some difference of opinion regarding it: and perhaps in fact the incidents of that system do vary in different places.

Several Judges who have sat in this Court have stated their own opinions on this subject, and their opinions have not been quite uniform. Perhaps our safest guide in the matter is what is to be found in special reports made by Revenue officers, and in the descriptions given in the Statistical Account of Bengal compiled by Sir W. W. Hunter from information carefully collected through local officers in the districts where the system exists. When the present Bengal Tenancy Act was under consideration by the Select Committee of the Legislative Council a memorandum by Mr. Cotton, then a Secretary to the Board of Revenue, on the various land tenures in Bengal, was submitted by the Government of Bengal for the information of the Select Committee. Mr. Cotton here reports upon the *utbundi* system

1890

BENI MADHUB CHUCKER-BUTTY v. BRUDUN MOHUN BISWAS.

and transcribes the passages describing it in the Statistical Account of Bengal in the districts of Nuddea (in which the land now in question is situated), Jessore, Moorshedabad, and Pubna; and he sums up the results. We quote the passage in the Statistical Report relating to the *utbundi* system in Nuddea:—*Utbundi* is applied to land held for a year, or rather for a season only. The general custom is for the husbandman to get verbal permission to cultivate a certain amount of land in a particular place at a rate agreed upon when the crop is on the ground. The land is measured and the rent is assessed on it." Mr. Cotton says too that the *utbundi* ryot abandons altogether (*i.e.*, has no right to claim again) any land, except such as he has under cultivation in any given year. The zemindar may let in jumma to some one any land which the *utbundi* ryot has not got under cultivation in any year.

Again, in September 1884, the Commissioner of the Presidency Division submitted to Government an analysis of the reports of his district officers regarding *utbundi* tenures. The Collector of Nuddea stated that cultivators who take such lands are not obliged to cultivate them a second year; but as a rule they can keep them for certain for three years if they elect to do so. Generally the lands under this system are cultivated from one to five years, and then left fallow for the same period. The cultivators acquire no right of occupancy, nor do they desire to do so.

These descriptions of *utbundi* do seem to refer rather to particular areas taken for cultivation for limited periods and then given up, than to holdings of which parts are cultivated and other parts lie fallow while the rent for the whole is assessed year by year with reference to the quantity within the holding under cultivation in that year. A holding of the latter description hardly seems to answer to the general conception of *utbundi*, although the rent may be arrived at each year by ascertaining what area has been cultivated. It is not clear to which description the four bighas of the present suit belong: whether they are part of a larger holding once settled with the plaintiff, or whether they form a separate holding which he has from time to time cultivated on the *utbundi* system during a period which has covered more than twelve years. If it is the former case, his right of occupancy

1890

BENI MADHUB CHUCKERBUTTY v. BHUBUN MOHUN BISWAS.

would seem to be complete: but if it is the latter case, we are not prepared to hold that cultivation at various times and under separate agreements on each occasion, such periods not being continuous, although of the same piece of land, would confer the right upon the ground that the first of such periods commenced more than twelve years before the alleged dispossession.

We accordingly set aside the decree of the lower Appellate Court and remand the case to that Court for a finding, after taking evidence, if necessary, on the question whether these four bighas are part of a larger holding or whether they have been occupied from time to time under the custom of a separate *utbandi* as above described. Costs to abide the result.

T. A. P. *Appeal allowed and Case remanded.*

Before Mr. Justice Tottenham and Mr. Justice Gordon.

1889 *September 2.*

GOBIND LAL ROY (ONE OF THE DEFENDANTS) *v.* BIPRODAS ROY AND OTHERS (PLAINTIFFS) AND OTHERS (DEFENDANTS).*

Sale for arrears of revenue—Suit to set aside sale—Attachment of property sold, not necessary—Sale ultra vires, *When—Act XI of 1859, ss. 5 and 17.*

The right to set aside a sale for arrears of Government revenue under Act XI of 1859 is not confined to proprietors alone, but extends to all persons, such as mortgagees, having an interest in the property antecedent to its sale.

Watson v. *Sreemunt Lal Khan* (1) relied on.

There is nothing in s. 5 of Act XI of 1859 which indicates that property sold for arrears of Government revenue should be under attachment at the time of sale.

A sale in contravention of ss. 5 and 17 of Act XI of 1859 is *ultra vires*, and therefore void.

The principle laid down by the Full Bench in the case of *Lala Mobaruk Lal* v. *Secretary of State for India in Council* (2) applied.

THIS was a suit to set aside a sale for arrears of Government revenue under Act XI of 1859.

*Appeal from Original Decree No. 42 of 1888, against the decree of Baboo Koilas Chunder Mookerji, Subordinate Judge of Rungpore, dated the 6th February 1888.

(1) 5 Moore's I. A., 447. (2) I. L. R., 11 Calc., 200.