APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

BHIRAM ALI SHAIK SHIKDAR (DEFENDANT) *v.* GOPI KANTH SHAHA (PLAINTIFF).*

1897. *January* 1.

Civil Procedure Code (Act XIV of 1882), section 244—Question for Court executing decree—Issue raised by defendant in separate suit—Bengal Tenancy Act (VIII of 1885), sections 65 and 73—Right of occupancy, Transferability of.

Section 244 of the Civil Procedure Code bars a suit brought for the determination of certain questions specified therein, but does not bar the trial of any issue involved in those questions if the issue is raised at the instance of a defendant in a suit brought against him.

Basti Ram v. *Fattu* (1) distinguished.

In the absence of custom or local usage to the contrary, a *raiyati* holding in which the *raiyat* has only a right of occupancy is not saleable at the instance of the occupancy *raiyat* or any creditor of his other than his landlord seeking to obtain satisfaction of his decree for arrears of rent.

THE lands in suit, in which the defendant had a mere right of occupancy, were sold in execution of a money decree obtained by the plaintiff against him and purchased by the plaintiff himself on the 21st August 1885. The plaint set forth that the plaintiff had been recognized as a tenant by the proprietors, and that he had obtained formal possession in 1886, but had failed to obtain actual possession. The suit was for *khas* possession with mesne profits.

The defence (so far as it is material) was that the defendant had no saleable interest in the property, and that the plaintiff did not therefore acquire any interest by his purchase.

The Court of first instance dismissed the suit. That decision was reversed on appeal by the lower Appellate Court, and the defendant brought this appeal to the High Court.

Babu *Dwarka Nath Chuckravarti* for the appellant.

*Appeal from Appellate Decree No. 1342 of 1895, against decree of A. Pennell, Esq., District Judge of Mymensingh, dated the 4th of May 1895, modifying the decree of Babu Krishna Chandra Chatterjee, Subordinate Judge of that district, dated the 30th of July 1894.

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Babu *Saroda Charan Mitter* and Babu *Promotho Nath Sen* for the respondent.

The judgment of the Court (BANERJEE and RAMPINI, JJ.) was as follows :—

This was a suit brought by the plaintiff-respondent to recover possession of some land constituting a *raiyati* holding of the defendant with the right of occupancy, on the allegation that the plaintiff purchased the same at a sale in execution of a decree for money obtained by him against the defendant, the plaintiff further alleging that he had, some time after the sale, obtained from the landlord a settlement of the same.

The defence in substance was that the holding in question was not transferable by sale, and that the plaintiff, therefore, acquired no right by his purchase.

The first Court found for the defendant, and dismissed the suit. On appeal, the lower Appellate Court has reversed the decision of the first Court and given the plaintiff a decree.

In second appeal it is contended for the defendant that the decision of the lower Appellate Court is wrong, inasmuch as the holding in question, being merely a *raiyati* holding with a right of occupancy, was not transferable, there being no evidence of any custom in favour of the transferability of such holdings, and that the lower Appellate Court ought to have held that the plaintiff had acquired no right by his purchase. On the side of the plaintiff-respondent, it was contended, in the first place, that section 244 of the Code of Civil Procedure was a bar to the defendant's raising the question whether the plaintiff acquired any right by his auction purchase, and, in the second place, that, according to the law as enacted in the Bengal Tenancy Act, a right of occupancy is transferable, unless the transfer is objected to by the landlord. The two questions, therefore, that arise for determination in this appeal are: first, whether section 244 of the Code of Civil Procedure is a bar to the defendant's contention that the plaintiff acquired no right by his auction purchase; and, second, whether a *raiyati* holding in which the *raiyat* has only a right of occupancy is transferable in the absence of any custom or local usage in favour of its transferability.

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We are of opinion that the first question must be answered in the negative. In support of the contention that section 244 was a bar to the suit, the case of *Basti Ram* v. *Fattu* (1) was cited. But that case is quite distinguishable from the present. There the judgment-debtor whose occupancy holding had been sold brought a suit to establish his tenant-right to the holding notwithstanding the sale, on the ground that an occupancy right was not saleable by law, and it was held that he was not entitled to maintain the suit, section 244 of the Code of Civil Procedure being a bar to such a suit. In the present case, the party who raises the objection that the plaintiff has acquired no right by his auction-purchase because the holding sold was a non-transferable one, has not brought any suit. He is only raising that objection in defence to the suit which the other side has brought, and section 244 is not, in our opinion, any bar to this plea being raised by the defendant in his defence. All that section 244 enacts is that certain questions therein specified shall be determined by the order of the Court executing the decree and not by separate suit; and granting that the question that the defendant now raises was one that came within the scope of section 244, still it does not follow that a defendant is precluded from raising that question by the provisions of section 244 when the question was not raised in the execution proceedings and has not been determined. The view that we take of section 244 is that it bars a suit brought for the determination of certain questions, but it does not bar the trial of any issue involved in those questions, if the issue is raised at the instance of a defendant in a suit brought against him. In our opinion section 244 in this respect differs from section 13 of the Code of Civil Procedure, which not only bars the trial of a suit or of an issue where the suit or the issue has actually been previously heard and determined, but also the trial of an issue which might and ought to have been raised in a previous suit by either party. Of course it would have been different if the question that is now raised had been raised in the proceedings under section 244 and determined. But then the trial of the issue would have been barred, not under section 244 by its own force, but under section 13 as being a matter that was *res judicata*, a decision under section 244 having the force of a decree. If section 244 was a bar

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to anything in a case like this, it would be a bar to the suit brought by the plaintiff, for it was competent to the plaintiff to have obtained a decision of the question that is now raised by instituting proceedings under section 244.

The answer to the second question must depend in the first instance upon the provisions of the Bengal Tenancy Act, which governs this case. Now referring to the chapter relating to occupancy rights, that is Chapter V of the Act, we find that while section 26 expressly makes occupancy rights heritable, there is no provision in this chapter, such as we find in the two preceding chapters relating to tenures and *raiyati* holdings at fixed rates, declaring occupancy holdings to be transferable. This omission, to our minds, clearly indicates that the Legislature did not intend to make occupancy rights transferable. Great stress was laid upon section 65 of the Bengal Tenancy Act as showing that the holding of an occupancy *raiyat* is intended to be made transferable; and section 73 of the Act was also referred to as pointing to the same conclusion. But we are of opinion that neither section 65 nor section 73 bears out the contention of the learned Vakil for the respondent. Section 65 enacts that where a tenant has an occupancy right, he shall not be liable to ejectment for arrears of rent, but his holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon. That, no doubt, makes an occupancy holding saleable at the instance of the landlord in execution of a decree for rent; but though that is so, it does not follow from that that an occupancy holding is saleable at the instance of the occupancy *raiyat* or of any creditor of his other than his landlord seeking to obtain satisfaction of his decree for arrears of rent. Such an inference is, in our opinion, clearly negatived by the absence in Chapter V of any provision relating to the transferability of occupancy holdings. Nor does section 73 warrant any contrary conclusion, seeing that there are cases in which occupancy *raiyats* may transfer their holdings without the consent of the landlord; we mean cases in which such holdings are transferable by custom or local usage. Of course, if occupancy holdings were transferable under the law as it stood before the passing of the Bengal Tenancy Act, they would continue to be transferable, as there is nothing in the Act to the contrary. If, on the other hand, they were not transferable

before the Bengal Tenancy Act came into operation, then, as the result of our examination of the Bengal Tenancy Act shows, they have not been rendered transferable by that enactment, and the old law in that respect continues unaltered.

This brings us to the consideration of the old law on the subject; and that need not detain us long, as the old law on the subject is clearly and conclusively laid down by a Full Bench of this Court in the case of *Norendro Narain Roy* v. *Ishan Chundra Sen* (1). In that case it was held that a right of occupancy was a right that was personal to the *raiyat*, and could not be transferred by sale. It may be anomalous that a landlord may, in satisfaction of his decree for arrears of rent, sell an occupancy holding, and yet neither the occupancy *raiyat* nor any creditor of his can sell it. But if there is any anomaly, we must take it that the anomaly has been intentionally created. It may well be that the Legislature thought it desirable not to make occupancy holdings liable to be cancelled for arrears of rent, as they were under the old law, and, as a compensation to the landlord, it was enacted that the landlord may bring occupancy holdings to sale for the satisfaction of any decree for arrears of rent due thereon; and yet the Legislature might have thought it undesirable to make occupancy holdings freely transferable by the occupancy *raiyat*, or at the instance of his creditors, apprehending that the effect of such free transferability would, in many instances, be to place the holdings of cultivating *raiyats* in the possession of money-lenders, and to place the *raiyats* themselves at their mercy.

It remains now to consider the effect of the landlord's consent to the transfer under which the plaintiff claims. Ordinarily, the only persons interested in impugning the validity of the transfer of an occupancy holding are the occupancy *raiyat* and the landlord; and where the former transfers his holding and the latter accepts the transferee in the place of the former tenant, there may arise no difficulty in the way of the transfer being given effect to. But that case is very different from the one now before us, where the transfer has been effected by compulsory sale at the instance of the *raiyat's* creditor, and the landlord's recognition has been obtained years after the transfer, although since the purchase he had been receiving rent from the former tenant. For

(1) 13 B. L. R., 274; 22 W. R., 22.

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all these reasons we are of opinion that the second question raised in the case should also be answered in the negative. The result is, that the decree of the lower Appellate Court must be set aside and that of the first Court restored with costs in this Court and in the Court of Appeal below.

F. K. D. *Appeal allowed.*

CRIMINAL REVISION.

Before Mr. Justice Ghose and Mr. Justice Gordon.

1897 *January* 28.

AUKHOY CHANDRA HATI (PETITIONER) *v.* CALCUTTA MUNICIPAL CORPORATION (OPPOSITE PARTY).*

Calcutta Municipal Consolidation Act (Bengal Act II of 1888), sections 335, 336—Date of taking out license.

In a case where the owner of a cowshed delayed taking out a license under section 335 of the Calcutta Municipal Consolidation Act (Bengal Act II of 1888), until the end of the month of May;

Held, that under the section as it stands there is nothing to compel a licensee to take out his license before 1st June in every year.

THE petitioner in this case who was a goala was charged before the Deputy Magistrate of Sealdah by the Conservancy Inspector of Ward No. 4 of the Calcutta Municipality with keeping cows on 20th and 21st May 1896 in an unlicensed cowshed, and that he kept his shed on those two days in a noxious state, and had thereby committed an offence under sections 335 and 337 of the Calcutta Consolidated Municipal Act. In defence the petitioner did not deny the second allegation of the prosecution, but alleged that as regards the first allegation he had applied to the Municipality for a license in accordance with the provisions of the section. The Deputy Magistrate of Sealdah sentenced him to pay a fine of Rs. 50 for committing an offence under section 335 of the Calcutta Municipal Act.

Babu *Boidonath Dutt* and Babu *Hari Charan Sarkal* for the petitioner.—The prosecution was premature. The alleged offence under section 335 is said to have been committed on the 20th and 21st May 1896. Under section 335 of the Calcutta Municipal

*Criminal Rule No. 667 of 1896, made against the order of Babu Shamadhub Ray, Deputy Magistrate of Sealdah, dated 3rd of August 1896.