PRIVY COUNCIL.

P. C.* 1896 *June* 19 & 27.

BENGAL INDIGO COMPANY (DEFENDANTS) *v.* ROGHOBUR DAS (PLAINTIFF).*

[On appeal from the High Court at Calcutta.]

Bengal Tenancy Act (VIII of 1885), section 5, sub-section 5, and section 25—Definition of raiyati holding—Lessees who are not raiyats within the Act—Zur-i-peshgi lease.

A tenant, holding under a lease assigned to him in 1890 by the original lessee, who since 1867 had continuously occupied the land under successive leases, claimed in virtue of the occupancy for more than twelve years, to be a *raiyat* within the Bengal Tenancy Act, 1885, either with occupancy, or with non-occupancy, rights: *Held*, that this tenant's holding was excluded from the operation of that Act by the effect of section 5, sub-section 5, on account of the extent of the area of the land leased, which was more than one hundred standard *bighas*.

A *zur-i-peshgi* lease is not a mere contract for the cultivation of the land at a rent, but is a security to the tenant for his money advanced. Two of the leases were *zur-i-peshgi*, or made on money advanced by the lessee to the lessor. The tenant's possession in this case was in part at least that of a creditor operating payment to himself, and was no foundation for a claim for occupancy rights.

As to the effect of written stipulations contrary to the latter, section 7 of the Bengal Rent law, Act X of 1859, is superseded, if not wholly repealed, by section 178 of the Bengal Tenancy Act, 1885.

Appeal from a decree (7th August 1894) of the High Court reversing a decree (31st October 1892) of the Second Subordinate Judge at Chapra in district Sarun.

ON this appeal no facts were in dispute, and the questions raised were entirely of law, consisting principally of the following, *viz.*, whether the appellants, the Bengal Indigo Company, proprietors of the Barouli Factory in the Sarun district, having obtained by assignment in 1890 leasehold lands, which had been occupied by their assignor for more than twelve years, had obtained the rights of a *raiyat* to the protection of their tenancy in virtue of Act VIII of 1885, the Bengal Tenancy Act. They claimed to be either as an occupancy *raiyat*, entitled to hold upon the

* *Present*: LORD WATSON, LORD HOBHOUSE, and SIR R. COUCH.

terms enacted therein or, as a non-occupancy *raiyat*, to be entitled to six months' notice to quit.

The defendants took the lease then current, that of the 15th February 1881, by assignment from the original lessee on the 24th April 1890 ; and in the same year, the lease having terminated on the 27th October 1890, they received notice to quit from the plaintiff. The leases, under which the alleged twelve years' occupancy took place, were the following :—

In 1867, the then proprietors of the Barouli Indigo Factory, E. G. Williams and Abdul Gyas Khan, obtained a lease from the 14th September 1867 for five years of 105 *bighas* 1 *cottah*, at a rent of Rs. 577 per annum, for the cultivation of indigo. This was granted by Mohant Ramcharan Das, the plaintiff's predecessor in the management of temple property. Both *pottah* and *kabuliyat* contained express agreements for the tenants giving up the land at the end of the term. In 1869 Abdul Gyas made over his interest in that lease to E. G. Williams.

In August 1872, Ramcharan Das executed to E. G. Williams a simple *ticca pottah* for ten years of 25 *bighas*, and on the 18th August 1872 the *mohant* executed to him a *zur-i-peshgi*, *ticca*, *patowa*, *pottah* for nine years of 240 *bighas* which included the 105 *bighas*, already leased, upon an advance by Williams of Rs. 4,500. The rent was Rs. 1,380 per annum, and the advance was to bear 6 annas interest a month, the balance being repayable by stipulated instalments. Both the *ticca pottah*, and the *zur-i-peshgi*, as well as the *kabuliyats* in both cases, contained express provisions for the land to be given up at the end of the terms. On the 15th February 1881, the plaintiff, who had succeeded as *mohant*, granted a *zur-i-peshgi*, *ticca*, *patowa*, *pottah* of the whole 265 *bighas* to Williams and Wilson, who then represented the indigo concern, in proportions according to their shares as partners, for nine years, upon an advance of Rs. 5,000. The rent was to be Rs. 1,523, out of which Rs. 550 yearly, and interest at 6 annas *per mensem*, was to be deducted in payment of the advance. Special provisions for surrender at the end of the term were in the *pottah* and in the *kabuliyat*.

On the 16th June 1890, notice, with fee, Rs. 33, was accepted by the plaintiff that the tenancy had been transferred to the defend-

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ant-company, to whom, on the 9th October 1890, the plaintiff sent notice to quit, and deliver possession on the 28th of that month, in pursuance of the terms of the lease.

The appellants not having given up the land, the respondent brought this suit on the 18th February 1891. His plaint stated the lease of the 15th February 1881, and alleged its expiration on the 27th October 1890. The appellants having held over, the plaintiff claimed possession with mesne profits of the 265 *bighas*, valuing his claim at Rs. 23,905. The appellants stated in their answer that the last lease had been transferred to them, that they had been recognized as tenants, and submitted that E. G. Williams was, at the time of the transfer, a "settled *raiyat*," having acquired a right of occupancy in the 256 *bighas*, a right which was transferable by the custom of the district. The appellants were therefore entitled to a right of occupancy under the Bengal Tenancy Act, 1885. Even if not so entitled, they were, as they contended, non-occupancy *raiyats*, on whom notice of not less than six months should have been served, to bring the tenancy to an end.

The following sections of Act X of 1859, the Bengal Rent law, and of Act VIII of 1885, the Bengal Tenancy Act, were referred to in the case:—

Act X of 1859, section 6.—Every *ryot* who has cultivated or held land for a period of 12 years has a right of occupancy in the land so cultivated or held by him whether it be held under *pottah* or not, so long as he pays the rent payable on account of the same; but this rule does not apply to *khamar*, *neejjote*, or *seer* land belonging to the proprietor of the estate or tenure, and let by him on lease for a term or year by year, nor (as respects the actual cultivation) to lands sublet for a term, or year by year, by a *ryot* having a right of occupancy. The holding of the father, or other person from whom a *ryot* inherits, shall be deemed to be the holding of the *ryot* within the meaning of this section.

Section 7.—Nothing contained in the last preceding section shall be held to affect the terms of any written contract for the cultivation of land entered into between a landholder and a *ryot*, when it contains any express stipulation contrary thereto.

Act VIII of 1885, section 5 (2).—"*Raiyat*" means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family; or by hired servants, or with the aid of partners, and includes also the successors in interest of persons who have acquired such a right.

Section 5, sub-section 4.—In determining whether a tenant is a tenure

holder or a *raiyat* the Court shall have regard to (*a*) local custom, and (*b*) the purpose for which the right of tenancy was originally acquired. Sub-section 5—where the area held by a tenant exceeds one hundred standard *bighas* the tenant shall be presumed to be a tenure holder until the contrary is shown.

Section 25.—An occupancy *raiyat* shall not be ejected by his landlord from his holding except in execution of a decree for ejectment passed on the ground (*a*) that he has used the land comprised in his holding in a manner which renders it unfit for the purposes of the tenancy, or (*b*) that he has broken a condition consistent with the provisions of this Act, and on breach of which he is, under the terms of a contract between himself and his landlord, liable to be ejected.

Section 45.—A suit for ejectment on the ground of the expiration of the term of a lease shall not be instituted against a non-occupancy *raiyat* unless notice to quit has been served on the *raiyat* not less than six months before the expiration of the term, and shall not be instituted after six months from the expiration of the term.

Section 178 (1).—Nothing in any contract between a landlord and a tenant made before or after the passing of this Act (*a*) shall bar in perpetuity the acquisition of an occupancy right in land, or (*b*) shall take away an occupancy right in existence at the date of the contract, or (*c*) shall entitle a landlord to eject a tenant otherwise than in accordance with the provisions of this Act.

(2)—Nothing in any contract made between a landlord and a tenant since the 15th day of July 1880 and before the passing of this Act shall prevent a *raiyat* from acquiring in accordance with this Act an occupancy right in land.

The following were the issues that raised the principal points :—

Whether under the terms of the two *ticca*, and the two *patowa* leases, dated, respectively, the 28th October 1867, the 17th August 1872, and the 15th February 1881, the defendant-company were bound to give up possession after the expiration of the last term.

Whether the defendants' vendor had acquired a right of occupancy, and whether the defendant-company stepped into that right by purchase.

Whether the notice served on the defendant-company was proper and sufficient.

The second Subordinate Judge made a decree dismissing the suit. In his judgment he gave his opinion that the *zur-i-peshgi* leases constituted *raiyati* holdings, and were not mortgages only; that by virtue of the twelve years' holding that had preceded the transfer to them, the defendant-company

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had obtained an occupancy right of which it could only be deprived for the causes stated in section 25 of the Bengal Tenancy Act, 1885, and that the conditions for surrender were invalid under section 178 of the same Act. The Judge considered that, in any case, the notice to quit was insufficient under section 45 of that Act.

The plaintiff appealed to the High Court. A Division Bench (TREVELYAN and AMEER ALI, JJ.) allowed the appeal, and reversing the decision of the first Court decreed in the plaintiff's favour. Their judgment stated the above facts, and the opinion of the Subordinate Judge thereon, stating also the questions that had been argued on the appeal before them to be: (1), have the defendant-company obtained a right of occupancy in the land; (2), if they have not obtained such right of occupancy are they non-occupancy *raiyats* and entitled as such to the benefits of section 45 of the Bengal Tenancy Act, 1885? The High Court thought the case depended upon the construction of section 7 of Act X of 1859, and proceeded as follows:—

In a Full Bench case to which we have been referred, *Sheo Prokash Misser* v. *Ram Sahoy Singh* (1), it was held that the mere fact that a *raiyat* held under written lease for a specified term of years, did not prevent his obtaining a right of occupancy in the land. In that case there was nothing more than a provision as to the term of the lease; there was not, as here, an express provision as to the tenant vacating the land at the expiration of his lease, and putting it into proper order. The provision that is made to cut down the *murhans* and their stumps which may be on the land at the expiration of the term, is inconsistent with its being contemplated that he was to hold over the term; so is also the provision that the landlord may, at the end of the term, uproot the stumps and settle the lands with other tenants. This is inconsistent with any right to retain possession of the land. Mr. Justice Dwarka Nath Mitter, in his judgment in the Full Bench case, says: "It is beyond all question, that if a *raiyat* possessing a right of occupancy enters into an express stipulation with his landlord to surrender the land on the expiration of a stated period of time, he would be bound, like any other individual, to fulfil the terms of his contract."

Throughout his judgment Mr. Justice Mitter assumes, that an express stipulation to vacate is an express stipulation within the meaning of section 7. On the first question we hold that the [illegible] s acquired no occupancy right. As to the second quest[illegible]r that there is not in this case a *raiyati* holding at all. The lease under which the tenant

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was last holding, was a *zur-i-peshgi* lease. The main object of such a lease is to provide for the payment of the *zur-i-peshgi* money, and that was the purpose for which the right of tenancy under which the defendants claim to hold was originally acquired. It is true that their predecessors first held under a lease, that of 1867, which was by no means a simple *raiyati* lease, but one which provided in the alternative either for cultivation by the lessees or for their letting out the land to other tenants. That lease, however, has ceased to have any effect. There has been a new and very different contract between the parties, and it is really to that contract that we must look. We know of no case where it has been held that the *zur-i-peshgidar* has been treated as a *raiyat*, and it would certainly be very hard upon the landlord if he should be so treated, as the landlord would be compelled, after the expiration of the term, to continue the tenancy at a rent instead of being able to get a new advance from some one else. The deeds of 1872 and 1881, though called leases, are ordinary *patowa* mortgages common in Behar, with the usual provision about the satisfaction of the money lent, which was clearly advanced on the security of the lands. The mere fact that the mortgagees would or could cultivate the lands with indigo or any other crop, cannot possibly affect the contract or convert the status of mortgagee into that of a *raiyat*. Certainly this is a novel case; a Limited Company claiming to be not only a settled *raiyat*, but to have occupancy rights. It is not necessary for us to decide any question as to whether *raiyati* rights can be acquired by a Limited Company. It is sufficient to say that the deed under which they are holding does not create any *raiyati* rights, and therefore is no answer to this suit. The plaintiff is entitled to a decree in terms of the prayer of the plaint. The amount of mesne profits must be ascertained by the lower Court. The plaintiff is entitled also to his costs of this suit in the Court below, and of this appeal.

The defendants having appealed,

Mr. *J. H. A. Branson*, and Mr. *Philip L. Buckland*, appeared for the appellant-company.

Mr. *J. D. Mayne* for the respondent.

For the appellants it was argued that it should have been decided in the Courts below that under the leases of 1867, 1872, and 1881, and with reference to the possession held continuously for cultivation since the first lease was granted, the right of occupancy had been acquired by the defendant-company. Section 178 of Act VIII of 1885 had not been referred to in the judgment of the High Court, which had been based on section 7 of Act X of 1859. There had been also an omission to notice that the lease of the 15th February 1881 was made at a date after the 15th July 1880, and before the passing of the Act in 1885, a period referred to in sub-section 2 of section 178 of that Act. It was contended

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that the leases were only leases, and in no sense mortgages. The Full Bench case, referred to in the judgment of the High Court, *Sheo Prokash Misser* v. *Ram Sahoy Singh* (1), showed that the mere taking a lease did not amount to the express stipulation which the Bengal Tenancy Act, 1885, no less than Act X of 1859, required; if the acquirement of the right of occupancy, by continuous cultivation of one holding for the prescribed period, was to be prevented by the relation of contract between landlord and tenant existing for another purpose besides cultivation only. The payment of money in advance was only a mode of paying the rent. "In any view of the appellants' rights, they were not liable to be evicted without the respondent's having given six months' notice of his intention to enforce the agreement to quit and deliver possession.

Counsel for the respondent was not called upon.

Their Lordships' judgment was, afterwards, on the 27th June, delivered by

LORD WATSON.—The appellant-company are owners of the Barouli Indigo Factory, which they acquired in April 1890. The respondent is proprietor of the entire 16 annas of Mehal Barouli, portions of which were occupied by the owners of the Factory, from the 14th September 1867, until September 1890, under a series of leases from the respondent and his predecessors. These were, (1) a *ticca pottah* of 105 *bighas* 1 *cottah* and 8 *dhoors*, for five years ending in September 1872; (2) a *peshgi patowa ticca*, for nine years ending in September 1881, of the 105 *bighas* 1 *cottah* and 8 *dhoors* included in the preceding lease, together with additional land bringing up the total area to 240 *bighas*; (3) a *ticca pottah*, of same date with the last, of 25 *bighas* for ten years ending in September 1882; and (4) a *zur-i-peshgi ticca patowa pottah*, of the whole 265 *bighas* included in the two previous leases, for an additional term ending in October 1890.

The first and third of these documents were in the ordinary terms of a lease for cultivation.

The second and the fourth of them had this peculiarity, that at their commencement, the tenants advanced to the lessor a lump sum, in the one case of Rs. 4,500 and in the other of Rs. 5,000,

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for the liquidation of debts due to his creditors, the tenants being entitled to recover payment by retaining out of the rents payable by them, a yearly instalment of the sum advanced, with interest at the rate of six annas *per mensem*. The lands were cultivated for the purpose of growing indigo; and the leases contained an express obligation by the tenants to quit occupation at their expiry.

On the 9th October 1890, the last of these leases having expired, the respondent served the appellants with a notice requiring them to remove from possession, and intimating that in the event of their failure to do so, a regular suit would be instituted. The notice having been disregarded, the present suit was brought by the respondent in February 1891, before the District Court of Sarun (1) for a declaration that the appellants had no right to retain possession, (2) to have exclusive possession decreed to the respondent, and (3) for mesne profits. In their written statement, the appellants pleaded that they and their predecessors in the Factory had acquired a permanent right as occupancy *raiyats;* and, alternatively, that, as non-occupancy *raiyats*, they were not liable to be ejected, except upon the terms and conditions specified in section 25 of the Bengal Tenancy Act 1885 (Act VIII of 1885).

The Subordinate Judge gave effect to the leading plea of the appellants, and dismissed the suit with costs. On appeal to the High Court, his decision was reversed by Trevelyan and Ameer Ali, JJ., who held, that the second and fourth of the leases above-mentioned did not create a proper right of occupancy for purposes of cultivation, and could not be made the foundation of a claim to *raiyat* occupancy. They further held that the appellants' defence was excluded by section 7 of Act X of 1859, which enacts that the provisions of the Statute "shall not be held to affect the terms of any written contract for the cultivation of land entered into between a landholder and a *ryot*, when it contains any express stipulation contrary thereto."

Their Lordships see no reason to differ from the views expressed by the learned Judges of the High Court, to the effect that the leases in question were not mere contracts for the cultivation of the land let; but that they were also intended to constitute, and did constitute, a real and valid security to the

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tenant for the principal sums which he had advanced, and interest thereon. The tenants' possession under them was, in part at least, not that of cultivators only, but that of creditors operating repayment of the debt due to them, by means of their security. Their Lordships cannot concur in the judgment of the High Court, in so far as it is founded upon section 7 of the Act of 1859, because that clause is superseded, if not wholly repealed, by section 178 of Act VIII of 1885, which does not appear to have been referred to in the argument addressed to the Court.

It is unnecessary to notice further the reasoning which prevailed in either of the Courts below, because it entirely ignores the statutory definition of the word "*raiyat*," contained in section 5, sub-section 5 of the Act of 1885. It is in these terms,—"Where the area held by a tenant exceeds one hundred standard "*bighas*, the tenant shall be presumed to be a tenure-holder "until the contrary is shown." That enactment is conclusive of the present case. The land held in tenancy by the owners of the Barouli Indigo Factory, under the respondent and his predecessors in title, has from the first been in excess, and, since 1872, largely in excess, of the statutory limit. The appellants are, therefore, not *raiyats*, either "occupancy" or "non-occupancy," within the meaning of the Act of 1885; and their defence to this suit is groundless.

Their Lordships will humbly advise Her Majesty to affirm the judgment appealed from. The appellants must pay to the respondent his costs of this appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Sanderson, Holland, Adkin & Co.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.