

Before Mr. Justice Ainslie and Mr. Justice McDonell.

LAL SAHOO (DEPENDANT) *v.* DEO NARAIN SINGH AND ANOTHER
(PLAINTIFFS).*

1878
March 25.

Holdings not liable to Enhancement (Guzastha Kasht)—Suit for removal of Buildings—Occupancy Rights not transferable—Beng. Act VIII of 1869, ss. 3, 4, 6.

The statutory right of occupancy under Beng. Act VIII of 1869 cannot be extended so as to make it include complete dominion over the land, subject only to the payment of a rent liable to enhancement. The landlord is still entitled to insist that the land shall be used for the purposes for which it was granted; and although the Court in such cases will be disposed to place a liberal interpretation on the rights of the tenant, it will not sanction a complete change in the mode of enjoyment.

IN this suit the plaintiffs, as owners of the land, sued the defendants to enforce the removal of the foundations of a certain house and to abstain from further building thereon. The plot of ground on which these foundations were laid was alleged to have been originally held, together with other lands, by the second defendant, Nuro Panday, from the plaintiffs, as a *guzastha kasht*, — *i. e.*, a holding on a rent not liable to enhancement. On the 21st September 1875 the second defendant sold to the first defendant that portion of the holding upon which the first defendant had begun the erection of a building, the subject of the present suit. The defendants contended that, according to the custom of the village, the sale by the second defendant passed to the first defendant the same rights in the land as those previously enjoyed by the vendor; and that the first defendant could, therefore, erect the building on the land without the consent of the superior landlord. The Court of first instance gave the plaintiffs a decree, finding on the facts that the rights possessed by the second defendant in the lands held by him from the plaintiffs were only those of an occupancy ryot; and, failing proof that according to the custom of the

* Special Appeals, Nos. 965 and 966 of 1877, against the decree of Moulvie Mahomed Moval Hossain, Subordinate Judge of Shahabad, dated 23rd February 1877, affirming the decree of Moulvie Adeeloodeen, Sudder Munsif of Arrah, dated 1st July 1876.

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village such occupancy rights were transferable, declared the sale to the first defendant invalid. It would appear that the witnesses for the defence left the Court without permission, and had not been examined. No steps were taken to bring them back for examination, but the Munsif instituted proceedings against them in the Criminal Court. On appeal the lower Appellate Court, affirming the decision of the Court below, held, that, even assuming that the second defendant possessed any transferable occupancy rights, he, as a mere cultivator, could not either himself build, or transfer to the first defendant the right to erect a house on any part of the land comprised in his holding. *Juggut Chunder Roy Chowdhry v. Eshan Chunder Banerjee* (1) was quoted in support of this view. It also found that no custom authorizing the transfer of occupancy rights without the consent of the landlord had been established, and that the defendant's complaint before it that his witnesses who would have proved the custom of alienating occupancy rights had not been examined, was immaterial in the view it took of the matter. The defendant, accordingly, presented this special appeal to the High Court.

Mr. *Evans* (with him *Baboo Mohesh Chunder Chowdhry*) for the appellant.

Baboos *Hem Chunder Banerjee* and *Kalikishen Sen* for the respondents.

Mr. *Evans*.—The plaintiffs simply sought to restrain the first defendant from building a house on land in his possession, and as ejectment was not sought, no question as to the rights of transfer in *Nuro Panday* could be considered in this suit. The judgment of the Court should have proceeded on the sole question whether or not the plaintiffs were likely to sustain damage by the erection of the house on the defendant's land. The case of *Juggut Chunder Roy Chowdhry v. Eshan Chunder Banerjee* (1) was remanded for decision on this very point. An opportunity was not afforded to the defendants to examine all the witnesses summoned on their behalf.

(1) 24 W. R., 220.

Baboo *Hem Chunder Banerjee*.—It is not denied that the defendant bases his title on Beng. Act VIII of 1869. The operation of this Act is confined solely to agricultural holdings; it may, therefore, be taken that, in letting the lands, the plaintiffs only intended them to be used for purposes of cultivation.

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The judgment of the Court was delivered by

AINSLIE, J. (who, after stating the nature of the suit and the finding of the Court of first instance, continued):— On appeal the Subordinate Judge affirmed the finding that the holding is not protected from enhancement, and also held that no custom of transfer of occupancy rights without the consent of the landlord had been established. This last finding is irrelevant, as ejection is not sought. He went on to hold that Nuro Panday had no right to build, and consequently could give no such right to his vendee. He assumes it to be an established rule that a lessee cannot build on land held by him for cultivation, and supports this view by a reference to the case of *Juggut Chunder Roy Chowdry v. Eshan Chunder Banerjee* (1). In that judgment the Court said: "It may well be that, in particular places, ryots having rights of occupancy in land for agricultural purposes may, by custom, have the right to transfer it to any person to hold for the same purpose; but that will not carry with it the proposition that a person who may be desirous of erecting a large house in the midst of an agricultural mehal, can buy up the tenures and rights of several cultivators and convert the land which they formerly occupied into a dwelling-house and appurtenances." These observations, however, are qualified by what follows. The Court did not dispose of the case simply on this view of the law, but remanded it for enquiry, among other things, whether any and what express injury resulted to the plaintiff from the acts complained of. It must, however, be borne in mind that, in this case, the defendant was co-sharer in the estate.

It is complained that the Subordinate Judge ought not to

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have affirmed the decree in favor of the plaintiff without enquiring whether any injury would result to the plaintiffs from the building commenced by the defendant, and without allowing him to give further evidence to establish the *guzasth* rights of Nuro Panday. (The learned Judge having referred to the defendant's witnesses not being examined, and the Subordinate Judge's finding thereon, continued.) Reference has been made by the respondent to what is called the *issumnavisee* of witnesses. This I think is of no importance. A party is not tied down to any particular line of enquiry indicated in a list of his witnesses, but the facts that his complaint to the lower Appellate Court was based on the exclusion of evidence on a particular point is sufficient to tie him down to that point in special appeal.

As to the other objection I think we must hold that a ryot, who relies upon an occupancy right must be taken as thereby admitting that the letting was of such a character as is contemplated in Beng. Act VIII of 1869; and it has been held that this law only applies to agricultural holdings. If then we take it that the land was let on the understanding that it was to be used for cultivation, the fact the ryot has acquired a right of occupancy does not alter any of the terms of the letting, except the conditions (if any) fixing a term for the tenancy.

The statutory right of occupancy cannot be extended so as to make it include complete dominion over the land, subject only to the payment of a rent liable to be enhanced on certain conditions. The landlord is still entitled to insist that the land shall be used for the purposes for which it was granted, and although a liberal construction may be adopted it cannot extend to a complete change in the mode of enjoyment.

The appeal must be dismissed with costs.

Appeal dismissed.