

*Before Sir Richard Gorth, Kt., Chief Justice, and Mr. Justice McDonell.*

1878  
May 1.

TIRTHANUND THAKOOR (PLAINTIFF) v. MUTTY LALL MISSER  
(DEFENDANT).\*

*Transfer of a portion of Occupancy Holding—Custom—Right of Zemindar—Ejectment.*

The existence of a custom in a particular district by which rights of occupancy in such district are transferable, will not justify the holder of such a right of occupancy in subdividing his tenure, and transferring different parts of it to different persons: and in case of such transfer the zemindar is entitled to treat the transferees as trespassers, and eject them.

THIS was a suit by the zemindar of certain lands to eject the defendant from a certain jote. The lands in suit originally formed a moiety of a tenure held under occupancy rights by one Pursajha, who sold them to the defendant. The Court of first instance, finding as a fact that occupancy rights were transferable according to the custom of the district in which the lands in question were situate, dismissed the suit. This decision was reversed by the lower Appellate Court without going into the evidence in the case, on the preliminary ground, that even admitting that the alleged custom which authorised the transfer of occupancy rights had been well proved, still such custom could not be taken to extend the right to transfer portions of an occupancy holding without the consent of the zemindar.

The defendant preferred a special appeal to the High Court, which was heard by Birch, J., sitting alone, the value of the property in suit not exceeding Rs. 50. The learned Judge remanded the case for a decision on the evidence, being of opinion that the sale of half the jote did not necessarily work a forfeiture of the rights of the original occupancy ryot, and that the remedy of the zemindar lay rather against such occupancy ryot, and not against his transferee.

The plaintiff thereupon preferred an appeal under s. 15 of the Letters Patent.

Baboo *Taruck Nath Dutt* for the appellant.

Baboo *Nil Madhub Sen* for the respondent.

\* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice Birch, dated the 11th of February 1878, in Special Appeal No. 1272 of 1877.

GARTH, C. J. (McDONELL, J., concurring).—We have not the least doubt about this case; and the time of the Court has been unnecessarily occupied by the respondent's pleader attempting to urge a point, which has been decided against him by the learned Judge of this Court, and against which decision he has not thought fit to appeal.

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The only question is, whether it is necessary or proper that there should be a remand; and the appeal is made to us upon the ground that the learned Judge was wrong in ordering a remand, when it had not been proved that there was any right by custom in the defendant, the occupancy tenant, to divide his tenure and transfer it to different persons.

An issue was raised distinctly by the Munsif, at the instance of the defendant, whether an occupancy ryot had a right by custom to transfer his tenure to different persons.

The Munsif found that occupancy ryots had a right in that locality to transfer their tenures generally. Whether he was justified, upon the evidence, in arriving at that conclusion, appears very doubtful. But assuming him to have been right in that finding, he did not go on to find, nor was there a particle of evidence upon which he could properly find, that an occupancy ryot had a right to divide his tenure and to transfer different parts of it to different people.

Under these circumstances, the defendant, who took, and who professed to take, a portion of the tenure under a transfer of this kind, was a mere trespasser.

It has been suggested that the original tenant would under such circumstances remain liable for the rent. But the original tenant has not paid any rent since the transfer; and when a suit was brought against him, he repudiated the tenure, and said that he had transferred it to different persons, of whom the defendant is one. If then the tenant could not transfer the tenure by custom, the zemindar had a right to treat the defendant as a trespasser, and to eject him.

The District Judge has come to a just conclusion, and we think that, under the circumstances, it would not be proper to remand the case. The judgment of Mr. Justice Birch will,

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therefore, be reversed, and the judgment of the District Judge will stand.

The appellant ought to have his costs of both hearings in this Court.

*Appeal decreed.*

*Before Mr. Justice Ainslie and Mr. Justice Lawford.*

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Sept. 14.

RAM LALL SINGH AND OTHERS (DEFENDANTS) v. LILL DHARY  
MUHTON (PLAINTIFF).\*

*Maintenance of Bunds—Prescriptive Right—Escape of Water—Injury to Neighbouring Properties—Vis Major.*

Where a defendant shows a prescriptive right to maintain a bund, and uses all reasonable and proper precautions for its safety, he cannot be made liable for damage caused by the escape or overflow of water on to the lands of others and the consequent injury of the crops thereon, if the escape or overflow be caused by the act of God, or *vis major*.

THIS was a suit brought by a ryot of one village against the owner of another for damages caused by the penning back of water, on the ground that the plaintiff had a right to cut the bund of the defendants under certain circumstances, and that the defendants wrongfully restrained him from exercising that right whereby his (the plaintiff's) lands became submerged, and thereby caused him damage.

The defence set up was, first, that the complaint ought to come from the proprietor, and not from individual ryots of the estate; and secondly, that the bund was one which the defendants had, for a long series of years, maintained for irrigation purposes; that they had acquired a prescriptive right to maintain it; that it was unchanged; and that there was no right in the plaintiff to cut it down at any time.

It was proved by the evidence that the bund was a long established one, and it was not said that any change in its condition had been recently made. Evidence was offered by the plaintiff that he had, for two continuous years, entered and cut the bund, but this the Munsif disbelieved.

\*; Special Appeals, Nos. 618, 619, 620, 621, 622, and 623 of 1877, against the decree of E. Grey, Esq., Officiating Judge of Zilla Patna, dated the 22nd of December 1876, reversing the decree of Moulvi Abdool Azeez, Munsif of Behar, dated the 29th of July 1876.