APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Mookerjee.

1904
July 4, 7.

HARI KISORE BARNA SARMA
v.
BARADA KISORE ACHARJYA CHOWDHURI.*

Occupancy-raiyat—Bengal Tenancy Act (VIII of 1885), ss. 23, 76 (2) (f), 77—Improvements—Masonry dwelling-house—Homestead land—Purposes of tenancy—Permanency, proof of—Injunction.

An occupancy-raiyat has a right to erect as a dwelling-house a building consisting of masonry walls with a corrugated iron roof, on the site of his ancestral dwelling-house within the homestead land of the holding; there is nothing in sections 23 and 76 of the Bengal Tenancy Act to prevent him from doing so.

There is nothing in section 76 of the Bengal Tenancy Act to indicate that a suitable dwelling-house of an occupancy-raiyat as described in that section, must be of a temporary description only.

Nyamutoollah Ostagur v. *Gobind Churn Dutt*(1) followed;

Prosunno Coomar Chatterjee v. *Jajun Nath Bysack*(2) referred to;

Anund Coomar Mookerjee v. *Bissonath Banerjee*(3) and *Beni Madhab Banerjee* v. *Jai Krishna Mookerjee*(4) distinguished.

SECOND APPEAL by the defendants, Hari Kisore Barna Sarma and others.

The plaintiffs, Barada Kisore Acharjya Chowdhuri and others, who are the zemindars, instituted the suit for a permanent injunction restraining the defendants from constructing a *pucca* building on the disputed land. It was alleged that the defendants, who were occupancy-raiyats, were attempting to construct a large *pucca* building on the land within their holding, that in

* Appeal from Appellate Decree No. 2097 of 1901, against the decree of D. N. Sarkar, Subordinate Judge of Mymensingh, dated July 29, 1901, reversing the decree of Shashi Bhushan Sen, Munsif of that district, dated Dec. 21, 1900.

(1) (1866) 6 W. R. (Act X.) 49.
(2) (1881) 10 C. L. R. 25.
(3) (1872) 17 W. R. 416.
(4) (1869) 7 B. L. R. 152; 12 W. R. 495.

the pergunnah ordinary tenants were not competent, in accordance with immemorial custom, to construct *pucca* buildings on their holdings without the consent of the landlords and that, if the defendants were allowed to do so, the condition of the land would be altered and it would become unfit for cultivation. The defendants contended that the land in dispute was their *lakheraj* land, that they had pulled down an old dwelling-house owned and held by them which stood on the land and were constructing on the same site a house, 18 cubits in length and 14 cubits in breadth, with *pucca* walls supporting a roof of corrugated iron; and that in the pergunnah even occupancy-raiyats had the right, by local custom and without the consent of the *maliks*, to construct houses of corrugated iron roof supported on walls.

The Munsif held that the defendants were occupancy-raiyats, that under sections 76 and 77 of the Bengal Tenancy Act, they had the right to construct the building in dispute, which was being erected on the homestead portion of the holding, that the custom was rather in favor of their case and accordingly dismissed the suit.

On appeal preferred by the plaintiffs, the Subordinate Judge reversed the decision of the Munsif and decreed the suit, holding that the building in question was not a *suitable* one for a raiyat, and that, if the landlords stood by and allowed such permanent structures to be raised, the defendants might hereafter claim a permanent interest in the land or heavy compensation in case of ejectment.

Babu Nilmadhab Bose (*Babu Mukunda Nath Roy* with him), for the appellants, contended that there was nothing in the Bengal Tenancy Act to prohibit an occupancy-raiyat from erecting a *pucca* building on the site of his former *kutcha* dwelling-house. Section 23, read with clause (*f*) of sub-section 2 of section 76, shows that he has the right to erect such a *pucca* building. The erection of a building does not impair the value of the land or render it unfit for the purposes of the tenancy. The words "suitable dwelling-house" in clause (*f*) show that the house should be suitable so as to be considered as an improvement within the meaning of the section.

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It was held under Act X of 1859, in the case of *Nyamutoollah Ostagur* v. *Gobind Churn Dutt*(1), that an occupancy-raiyat could erect a *pucca* building: see also *Prosunno Coomar Chatterjee* v. *Jagun Nath Bysack*(2). Other cases which seem to take a contrary view are clearly distinguishable. In those cases the raiyat attempted to convert a portion of the land actually used for agriculture into a building ground: see *Jugut Chunder Roy Chowdhry* v. *Eshan Chunder Banerjee*(3) and *Lal Sahoo* v. *Deo Narain Singh*(4).

Mr. Hill (*Babu Dwarkanath Chakravarti* with him), for the respondents, contended that a masonry dwelling-house was not "suitable" to an occupancy holding, which was not of a permanent character, within the meaning of clause (*f*) of sub-section 2 of section 76 of the Bengal Tenancy Act. An occupancy-raiyat, having no permanent interest in the land of the holding, has no right to erect on it a building of a permanent nature. Besides, such a building would alter the character of the holding, and if erected without the consent of the landlord, might in future be pleaded as evidence of a permanent right: see *Anund Coomar Mookerjee* v. *Bissonath Banerjee*(5) and *Beni Madhab Banerjee* v. *Jai Krishna Mookerjee*(6).

Babu Nilmadhab Bose, in reply.

Cur. adv. vult.

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BRETT AND MOOKERJEE, JJ. This suit was brought by the plaintiffs against the defendants appellants to obtain a permanent injunction against them restraining them from constructing any masonry building on the land included in their holding. The defendants are admittedly raiyats with a right of occupancy, and from their written statement it appears that the building which they were constructing for the purpose of a dwelling-house was a house 18 cubits in length by 14 cubits in breadth, consisting of

(1) (1866) 6 W. R. (Act X.) 40.
(2) (1881) 10 C. L. R. 25.
(3) (1875) 24 W. R. 220.
(4) (1878) I. L. R. 3 Calc. 781; 2 C. L. R. 294.
(5) (1872) 17 W. R. 416.
(6) (1869) 7 B. L. R. 152; 12 W. R. 495.

masonry walls supporting a corrugated iron roof. This building they were constructing on the site of their old dwelling-house and on land which for generations had been the homestead land of the holding.

The case for the plaintiffs was that the defendants had no right to erect such a building without first obtaining their consent as landlords. For the defendants it was contended that under the provisions of section 77 and clause *f* of sub-section (2) of section 76, of the Bengal Tenancy Act, they had a right without the landlord's consent to erect a suitable dwelling-house in the holding and that the building, which they were erecting, was a suitable dwelling-house, and came under the description of an improvement to the holding.

The Munsif held that the building, which the defendants were erecting, came within the description of a suitable dwelling-house and that they had a statutory right to construct it. He accordingly dismissed the plaintiffs' suit.

On appeal the Subordinate Judge has set aside the judgment and decree of the Munsif and has decreed the plaintiffs' suit. He appears to have held that as the building under construction was of a permanent nature, the defendants, as raiyats with rights of occupancy and as such having no permanent interest in the land, had no right to construct it without the landlord's consent, and that it was not a suitable dwelling-house for a raiyat, who had not a permanent interest in the land. The defendants have appealed to this Court.

On behalf of the appellants, it has been contended that the erection of the building in question by the defendants was an improvement within the meaning of clause *f* of sub-section 2 of section 76 of the Bengal Tenancy Act, and further that under the provisions of section 23 of the Act the defendants were within their rights, as the construction of the building in question did not materially impair the value of the land or render it unfit for the purposes of the tenancy. In support of this view the cases of *Nyamutooliah Ostagur* v. *Gobind Churn Dutt*(1), and of *Prosunno Coomar Chatterjee* v. *Jugun Nath Bysack*(2) are relied on.

(1) (1866) 6 W. R. (Act X). 40. (2) (1881) 10 C. L. R. 25.

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The learned Counsel for the respondents has on the other hand argued that as a raiyat with a right of occupancy has no permanent interest in the soil of the holding, he has no right to erect a building of a permanent nature. He has further urged that the erection of such a building will alter the character of the tenancy, for being a structure of a permanent nature it will evidence a permanent right. He contends that the dwelling-house referred to in clause *f* of sub-section 2 of section 76 of the Bengal Tenancy Act must be one suitable to the holding and not to the condition in life or circumstances of the tenant, and that a masonry dwelling-house is not suitable to a holding which is not of a permanent nature. He has referred us to the case of *Anund Coomar Mookerjee* v. *Bissonath Banerjee*(1) as laying down the principle which should be followed in this case, and to the case of *Beni Madhab Banerjee* v. *Jai Krishna Mookerjee*(2) as indicating the danger and trouble which would accrue to a landlord if tenants with occupancy rights could, without his consent, construct dwelling-house of a permanent character. He urges that a tenant, who wishes to build such a house, must first obtain the landlord's consent or purchase a permanent right in the land, and that the mere issue by the landlord to the tenant of a notice of objection would not be sufficient to protect the landlord's right as in course of time all evidence of that objection would disappear.

The question which we have to decide is whether a raiyat with a right of occupancy, like the defendants, has a right to erect as a dwelling-house a building consisting of masonry walls and a corrugated iron roof, 18 cubits in length and 14 cubits in breadth, on a site in the holding on which the dwelling-house had all along stood and which had been used as the homestead land of the holding from the time of his father and of his predecessors in interest before him. We propose to confine our judgment to this question alone.

The case of *Nyamutoollah Ostagur* v. *Gobind Churn Dutt*(3) laid down so long ago as 1866 that "a raiyat with a right of occupancy may build a *pucca* house on his land, ... so long as

(1) (1872) 17 W. R. 416. (2) (1869) 7 B. L. R. 152; 12 W. R. 495.

(3) (1866) 6 W. R. (Act X). 10.

he does not injure it to the detriment of the landlord," and that view was assented to in 1881 in the case of *Prosunno Coomar Chatterjee* v. *Jagun Nath Bysack*(1). The case of *Anund Coomar Mookerjee* v. *Bissonath Banerjee*(2), has no application to the facts of the present case. In that case it was held that a tenant with a right of occupancy had no right to dig excavations in his holding for the purpose of making a brickfield.

There is therefore authority that under the old Acts it was held that a raiyat with a right of occupancy had a right to erect a *pucca* dwelling-house on his holding. The contention advanced on behalf of the respondents is that such a house cannot be regarded as a suitable dwelling-house within the meaning of clause *f* sub-section 2 of section 76 of the Bengal Tenancy Act because it is of a permanent character. The objection based on the ground of permanency alone does not, however, appear to be suitable. A dwelling-house constructed with strong *sal* wood posts and beams would certainly be of as permanent a character as one the walls of which were made of sun-burnt bricks or even kiln-burnt bricks cemented together with mud, and objection has never been taken to a dwelling-house of the first description. There is nothing in the provisions of the section to restrict the tenant to a temporary erection only as a dwelling-house, and in fact such a temporary erection could hardly be regarded as of the nature of an improvement. There is nothing therefore to indicate that a suitable dwelling-house as described in section 76 must be one of a temporary description only. The objection which the learned Counsel for the respondents has taken, based on the decision in the case of *Beni Madhab Banerjee* v. *Jai Krishna Mookerjee*(3), that, if tenants were to be allowed to erect houses such as is contemplated in the present case, it would be to permit the tenant to create evidence of a permanent tenure to the detriment of the landlord, does not appear to be sound. If it be held that an occupancy-raiyat has a right without the consent of his landlord to erect as a dwelling-house such a building as is contemplated in this case, its erection can raise no presumption against the landlord that the tenancy is permanent, any more than any

(1) (1881) 10 C. L. R. 25. (2) (1872) 17 W. R. 416.
(3) (1869) 7 B. L. R. 152; 12 W. R. 495.

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other lawful improvement which the tenant might carry out on the holding. The provisions of section 76 do not in our opinion bar the defendants from erecting the dwelling-house proposed in this case.

Nor does the objection that the dwelling-house must be suitable to the holding appear to carry any weight in this case. The house, which it is proposed to erect on the land, which has all along been the homestead land of the holding, cannot be held to materially impair the value of the land or render it unfit for the purposes of the tenancy so as to contravene the provisions of section 23 of the Tenancy Act. It is not proposed to reduce the area of the agricultural lands in the holding, or to apply the site on which the house is to be erected to purposes different from those to which it has all along been devoted.

The building, which it is proposed to erect, is certainly not one which on account of its size is unsuitable to the character of the holding.

We can find no reasons therefore why the tenants-defendant should be in any way restrained from constructing the dwelling-house which they propose to erect, and we are unable to agree with the findings of the lower Appellate Court on this point. We are also unable to accept the view suggested by the learned Counsel's remarks that the tenant should not be allowed to execute any improvement in his holding without first obtaining the consent of the landlord by the payment of some sum of money. The tenant has a right to erect a suitable dwelling-house on his holding as an improvement thereto, and the improved dwelling-house which the defendants propose to erect is nothing more than a suitable dwelling-house within the meaning of section 76 of the Tenancy Act.

We accordingly set aside the judgment and decree of the lower Appellate Court and restore the order of the Munsif with costs. The result is that the suit of the plaintiffs will stand dismissed with costs in all the Courts.

Appeal allowed.

M. N. R.