CIVIL RULE.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

1910
Jan. 11.

PRADYOTE KUMAR TAGORE
v.
GOPI KRISHNA MANDAL.*

Incumbrance—Putni tenure—Customary right to cut and appropriate trees, whether an incumbrance—Putni Regulation (VIII of 1819) s. 11—Right of an auction-purchaser at a sale held under the Putni Regulation to avoid such incumbrance—Bonâ fide engagement made by the defaulting proprietor with resident and hereditary cultivators, effect of.

A customary right to cut and appropriate trees is an incumbrance within the meaning of s. 11 of Regulation VIII of 1819.

A purchaser of a *putni talug* at a sale held under Regulation VIII of 1819 is not entitled to hold the property free from a customary right or a right recognised by usage which has grown up during the subsistence of the *putni*, and under which occupancy raiyats are entitled to appropriate and convert to their own use such trees as they have the right to cut down, inasmuch as he is not entitled to cancel a *bonâ fide* engagement made by the defaulting proprietor with the resident and hereditary cultivators.

RULES granted to the petitioner, Maharaja Sir Pradyote Kumar Tagore.

The petitioner, a purchaser of a putni taluq at a sale held under Regulation VIII of 1819, brought four suits against the defendant tenants, which were tried together, for recovery of damages for cutting and appropriating several palm trees that stood on their *jotes*. The defendants denied the plaintiff's claim, and contended that they had a right to cut and appropriate the trees by custom. The learned Munsif, exercising the powers of a Small Cause Court Judge, dismissed the plaintiff's suit.

Against this decision the plaintiff obtained the Rule under section 25 of the Provincial Small Cause Courts Act, 1887.

Babu Shib Chandra Palit, for the petitioner. The burden of proof to appropriate is on the tenants; they have failed to

*Civil Rules No. 2999, etc., of 1909.

discharge it. A custom must be ancient, invariable and certain. The decrees obtained by the plaintiff zemindar against other tenants show that the custom, if any, is not yet certain and invariable, and therefore cannot have the effect as such. Besides, the present plaintiff, the zemindar, having purchased the putni at a sale under Regulation VIII of 1819, is not bound by any custom which has grown when the putni was in existence. The zemindar could not, during the continuance of the putni, interfere and stop the growth. His cause of action begins when the putni comes to an end. Custom of this sort is an incumbrance within the meaning of section 11, clause (*i*) of the Putni Law : see *Woomesh Chunder Goopto* v. *Raj Narain Roy* (1), *Khantomoni Dasi* v. *Bijoy Chand Mahatab* (2), *Karmi Khan* v. *Brojo Nath Das* (3), and *Nuffer Chandra Pal Chowdhry* v. *Rajendra Lal Goswami* (4). A zemindar or a purchaser at the putni sale must not be burdened with any liability by which the zemindary is incumbered through the laches of the putnidar.

Babu Ram Chandra Majumdar, for the opposite party. As to the onus, the finding of the lower Court is conclusive, *viz.*, that there is a custom or local usage to the effect that the tenants cut and appropriate trees without the permission of the landlord and without payment : see *Nafar Chandra Pal Chowdhury* v. *Ram Lal Pal* (5). As to the decrees obtained by the plaintiff in 1907, it appears that one of them was an *ex parte* decree, and the other two obtained by consent ; as such they do not disprove custom.

As to the contention that custom being an incumbrance has been wiped out of existence by the putni sale, my answer is, *firstly*, it is not an incumbrance. The word is not defined in the Putni Law. The word as defined in the Bengal Tenancy Act in section 161 does not obviously include and mean a custom or usage. The kinds of incumbrances which are liable to be cancelled or annulled by the putni sale, are given in section

(1) (1868) 10 W. R., 15.
(2) (1892) I. L. R. 19 Calc., 787.
(3) (1894) I. L. R. 22 Calc., 244.
(4) (1897) I. L. R. 25 Calc., 167.
(5) (1894) I. L. R. 22 Calc., 742.

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11 of Regulation VIII of 1819. They evidently mean transactions which are acts of parties. A custom or usage can hardly be worked upon as an act of the parties: *vide* paras. 2 and 3 of section 11. It grows in spite of the acts of the parties and becomes an incident of the holdings. It is an incorporeal right which becomes attached to the holdings. Such incorporeal rights are not at all contemplated by section 11. In the case of adverse possession, the lands go out of the possession of the putnidar and are lost to the mehal, and the incoming purchaser becomes entitled to them. In the case of custom or usage, the holdings remain and are not lost to the mehal, the custom or usage only inhering to them. It is analogous to the acquisition of the right of occupancy. The right grows in spite of the acts of parties, and can hardly be looked upon as an incumbrance.

Secondly, even if it is looked upon as an incumbrance, it is protected under clause 3 of section 11 of Regulation VIII. It is a sort of *bonâ fide* engagement made with the tenants by the late incumbent.

Babu Shib Chunder Palit, in reply.

Cur. adv. vult.

MOOKERJEE AND TEUNON, JJ. The substantial question of law which arises in these Rules is one of some novelty and nicety, and relates to the right of the purchaser of a putni taluk at a sale held under Regulation VIII of 1819 to hold the property free from a customary right or right recognised by usage, which has grown up during the subsistence of the putni, and under which occupancy raiyats are entitled to appropriate and convert to their own use such trees as they have the right to cut down. Upon the facts found by the Court below, the tenants defendants have cut down and appropriated several palm trees which stood on their holdings. They resisted the claim of the landlord petitioner for damages, on the ground that they had a customary right not only to cut down, but also to appropriate trees. This they have established by evidence; but it is contended on behalf of the landlord that as this custom

came into existence and gradually developed after the creation of the putni and during its continuance, and as he has purchased the property at a sale for arrears of rent under Regulation VIII of 1819, he is entitled to hold the property in the condition in which it was before the putni was granted, and he is not bound to recognise any customary rights that may have grown up in the interval. It may be added that the origin of the putni is not known, but the plaintiff appears to have made his purchase about sixteen years before the date of the suit, and he has recently succeeded in obtaining three decrees for damages against three tenants who had cut down and appropriated trees on their holdings; two of these, however, were consent decrees, and the third was obtained *ex parte*. The Court below has, therefore, rightly treated these instances as insufficient to affect the validity and operation of the custom. The question which now demands investigation is, whether this customary right can be successfully asserted by the tenants against the plaintiff. For the solution of this question, it is necessary to examine for a moment the manner of the origin and growth of a customary right of this description.

In the case of *Palakdhari Rai* v. *Manners* (1), this Court was called upon to consider the nature of the custom or usage by which an occupancy raiyat is entitled to transfer his holding without the consent of his landlord. Reliance was then placed upon a passage from a judgment of the Judicial Committee in *Juggomohun Ghose* v. *Manick Chund* (2), where their Lordships, in dealing with the case of a mercantile usage, observed as follows: "To support such a ground, there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes local law. The usage may still be in the course of growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract." This

(1) (1895) I. L. R. 23 Calc., 179. (2) (1859) 7 Moo. I. A., 263, 282

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passage indicates the mode, if not of the origin, at any rate of the growth of a customary right, or right recognised by usage. Substantially the same view has been indicated in other cases of the highest authority. Thus in *Arthur* v. *Bokenham* (1), Trevor, C.J., points out that customs owe their origin to common consent, and must consequently have been peaceable and acquiesced in, and not disputed at law or otherwise, and observes as follows: "Customs are not to be enlarged beyond the usage, because it is the usage and practice that makes the law in such cases, and not the reason of the thing, for it cannot be said that a custom is founded on reason, though an unreasonable custom is void; for no reason, even the highest whatsoever, would make a custom or law, and therefore you cannot enlarge such custom by any parity of reasoning, since reason has no part in the making of such custom:" see also Dane's Abridgement, Chapter XXVI, Article 1, Section 3. If, therefore, customs owe their origin to common consent, and because they recommend themselves as expedient to all, by what precise process do they become binding on parties who enter into contractual relations? As Tilghman, C.J., puts it in *Stultz* v. *Dickey* (2), "When the custom of a country or of a particular place is established, it may enter into the body of a contract without being inserted; both parties are supposed to know it and to be bound by it, unless provision to the contrary is made in the contract." To the same effect is the judgment of Baron Parke in *Hutton* v. *Warren Clerk* (3), where that learned Judge observes as follows: "It has long been settled in commercial transactions that evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent." The same rule has also been applied to contracts in other transactions in life in which known usages have been established and prevailed, and this has been done upon the principle of presumption, that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract

(1) (1708) 11 Modern 148, 161. (2) (1812) 5 Binn. 285.
(3) (1836) 1 M. & W., 466.

with reference to those known usages": see also *Gibson* v. *Small* (1), where Baron Parke treats the same principle as applicable to agricultural contracts, and the notes to *Wigglesworth* v. *Dallison* (2). We start, therefore, with the proposition that agreements founded on consent are the origin of customs; such agreements, though at first matters of option, when they are established as customs, cease to be matters of choice, and acquire an obligatory element or a binding force. When the custom or usage has become developed and has acquired a binding character, it becomes by implication incorporated into transactions, and can no longer be ignored when the rights of the parties thereunder come to be determined. When, therefore, a landlord acquiesces in a certain course of conduct by his tenants, for instance, an appropriation by them of the trees in their holdings, and such acquiescence has led to the growth of a custom or usage which is binding upon him, the position of the parties is the same as if the landlord had expressly granted to them a right to appropriate the trees. The question now arises, whether the grant of such right is an incumbrance, which is inoperative as against the purchaser of the putni taluk, or whether it is a *bonâ fide* engagement with the tenant which is protected by the law.

Now it is well settled that property in trees is by the general law vested in the zemindar. The tenant is entitled to cut down trees, provided there is no local custom to the contrary, but he can appropriate the trees when felled, only if such appropriation is sanctioned by local custom: *Nafar Chandra Pal Chowdhuri* v. *Ram Lal Pal* (3), *Nuffer Chunder Ghose* v. *Nund Lal Gossyamy* (4), *Sitab Rai* v. *Dubal Nagesia* (5), *Kausalia* v. *Gulab Kuar* (6), *Ganga Dei* v. *Badam* (7), *Ruttonji Eduljee Shet* v. *Collector of Tanna* (8), *Honywood* v. *Honywood* (9); Taylor on Landlord and Tenant, Section 354.

(1) (1853) 4 H. L. C. 353, 397.
(2) (1779) 1 Douglas, 201; 1 Smith L. C., 545.
(3) (1894) I. L. R. 22 Calc. 742.
(4) (1890) I. L. R. 22 Calc., 751.
(5) (1907) 6 C. L. J. 218.
(6) (1899) I. L. R. 21 All., 297.
(7) (1908) I. L. R. 30 All., 134.
(8) (1867) 11 Moo. I. A., 295.
(9) (1874) L. R. 18 Eq., 306.

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When, therefore, tenants who have originally no right to appropriate trees which have been felled, are allowed to do so, and this course of dealing is acquiesced in for a length of time, and in numerous instances so as to ultimately entitle the tenants to a customary right of appropriation, tacitly incorporated into their contracts, the result is a substantial encroachment upon the rights of the landlord. Can such a right be properly described as an incumbrance within the meaning of section 11 of Regulation VIII of 1819? That section does not define the term 'incumbrance,' but provides that, when a putni taluk is sold for arrears of rent, it is sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives, or assignees. As instances of incumbrances, we find mentioned in the same section transfers by way of sale, gift or otherwise, mortgages and other limited assignments, and also leases created by the holder of the tenure. A customary right of the description mentioned would not be included in any of these specific illustrations. At the same time it would not be right to treat the instances of incumbrances mentioned in the section as absolutely exhaustive. It becomes necessary, therefore, to examine for a moment the meaning of the term 'incumbrance.' Wharton, in his Law Lexicon, defines an incumbrance as "a claim, lien, or liability attached to property," which definition is adopted by Romer, J., in *Jones* v. *Barnett* (1). Sweet, in his Law Dictionary, observes that to encumber land is to create a charge or liability, for example by mortgage, and adds that incumbrances include not only mortgages and other voluntary charges, but also liens, *lites pendentes*, registered judgments and writs of execution. In the Oxford Dictionary, an incumbrance is broadly defined as a burden on property, and reference is made to Bacon's Maxims and Uses where he speaks of certain acts as collateral incumbrances. In the Encyclopædia of American and English Law, an incumbrance is defined as a burden upon land depreciative of its value, such as a lien, easement, or servitude which,

(1) [1899] 1 Ch., 611, 620.

though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee. Similar definitions are given in the Law Dictionaries by Abbott and Anderson. Bouvier, in his Law Dictionary, defines an incumbrance as "any right to, or interest in, land which may subsist in a third person to the diminution of the value of the land, and not inconsistent with the passing of the fee in it by a deed of conveyance," which is taken from the decision in *Prescott* v. *Trueman* (1). In *Memmert* v. *McKeen* (2), an incumbrance is stated to be a burden or charge on property, a claim or lien on an estate, which may diminish it in value, and incumbrances are then divided into two classes, namely, *first*, such as affect the title to the property; and *secondly*, such as affect only the physical condition of the property. A mortgage or other lien is a fair illustration of the former, while a public road or right of way is an illustration of the latter. The definitions which we have quoted above are comprehensive enough to include a right granted to a stranger to cut and appropriate trees, and there is in fact one judicial decision [*Cathcart* v. *Bowman* (3)] where this view has been maintained—a view which has the support of more than one leading text-writer: Tiffany on Real Property, Volume II, 906, and Jones on Real Property, Volume I, 755, and Rawle on Covenants of Title, 98.

It is obvious that if a right granted to another to cut and appropriate trees on land is treated as an incumbrance, a customary right which has precisely the same effect may be comprehended in the term incumbrance. Reference may in this connection be made to the decisions in *Womesh Chunder Goopto* v. *Raj Narain Roy* (4), *Khantomoni Dasi* v. *Bijoy Chand Mahatab Bahadur* (5), and *Nuffer Chandra Pal Choudhry* v. *Rajendra Lal Goswami* (6), which recognise the doctrine that the title acquired by adverse possession against a putnidar is an incumbrance that has accrued upon the *taluk* by the act of the defaulting proprietor. By way of analogy, it may well be

(1) (1808)4 Mass. 627; 3 Am. Dec. 249.
(2) (1886)112 Pa. 315, 4 Atlantic, 542.
(3) (1847) 5 Barr. 317.
(4) (1868) 10 W. R. 15.
(5) (1892) I. L. R. 19 Calc. 787.
(6) (1897) I. L. R. 25 Calc. 167.

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maintained that a customary right which owes its origin and growth to the acquiescence of the landlord stands on the same footing as a right expressly granted by him ; so that, if a right to cut and appropriate trees expressly conferred on a stranger be treated as an incumbrance, a customary right of that description may very well be included in the same category. We are consequently not prepared, as at present advised, to overrule the contention that a customary right to cut and appropriate trees may be an *incumbrance on the property*. But we are of opinion that even if this view be maintained, the plaintiff is not entitled to succeed. The third clause of section 11 of the Putni Regulation provides that the purchaser shall not be entitled to cancel a *bonâ fide* engagement made by the defaulting proprietor with resident and hereditary cultivators. The cases have been argued before us on the assumption that the tenants in these cases fall within this description. If the landlord made an engagement with such a tenant that he would be entitled to appropriate the trees in his holding, the purchaser of the putni taluk would, in our opinion, be bound thereby. A customary right in favour of all the tenants, by which they are entitled to appropriate the trees, would be equally operative against the auction-purchaser. It is further obvious that, as pointed out by this Court in *Majoram Ojha* v. *Raja Nilmoney Singh Deo* (1), the fact that the auction-purchaser is the original zemindar who created the putni does not place him in a better position. We must, therefore, hold that treating an engagement with a stranger by which he is authorised to cut and appropriate trees as an incumbrance imposed upon the land by the owner, treating further a customary right of this description, which owes its origin and growth to the acquiescence of the owner, as included in the category of incumbrances, the creation or growth of such right, whether contractual or customary, must, in the present instance, be regarded as a *bonâ fide* engagement with a resident and hereditary cultivator, which the auction-purchaser at the putni sale is not entitled to abrogate.

(1) (1874) 13 B. L. R. 198 ; 21 W. R. 326.

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We desire to add that no arguments were addressed to us upon the question of the possible effect of the doctrine of acquiescence upon the position of the plaintiff who has accepted rent from the tenants for sixteen years after his purchase; nor was there any discussion at the Bar as to how far the tenants as occupancy raiyats might be protected under the Bengal Tenancy Act. Our judgment, therefore, must not be regarded as a decision upon either of these questions, or as an approval by implication of the principle laid down in *Jogeshwar Mazumdar* v. *Abed Mahomed Sirkar* (1).

The result is that these Rules must be discharged with costs.

S. G. *Rules discharged.*

(1) (1896) 3 C. W. N., 13.

CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

AMBLER

v.

SAMI AHMED.*

1910

Jan. 25.

Dispute concerning land—Attachment of subject of dispute—Order of Settlement Court in a proceeding between the same parties and relating to the attached lands—Effect of such order—Release of attachment by Magistrate—Criminal Procedure Code (Act V of 1898), s. 146—Bengal Survey Act (Beng. Act V of 1875), s. 41.

An order of the Survey and Settlement Courts, under the Bengal Survey Act, 1875, section 41, is a determination by a competent Court of the rights of the parties entitled to possession of the land within the meaning of section 146 of the Criminal Procedure Code.

Where the Magistrate attached certain lands under section 146 of the Code, and in a proceeding under section 41 of the Bengal Survey Act, 1875, between the same parties, the same lands were found to be in the possession of the petitioner:—

Held, that the Magistrate was bound to follow such order and to release the lands from attachment.

The petitioner, C. T. Ambler, junior, claimed to hold certain plots of land in mouzas Birozepur and Khudiban as a

*Criminal Revision No. 1453 of 1909, against the order of H. F. Samman, District Magistrate of Monghyr, dated Aug. 31, 1909.