Privy Council Appeal No. 91 *of* 1919.

Bengal Appeal No. 127 *of* 1917.

The Midnapur Zamindari Company, Limited - - - *Appellants*

v.

Kumar Naresh Narayan Roy - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH DECEMBER, 1920.

Present at the Hearing :

LORD DUNEDIN.
LORD MOULTON.
MR. AMEER ALI.

[*Delivered by* LORD DUNEDIN.]

This is an appeal from the judgment of the High Court of Calcutta affirming a judgment of the Subordinate Judge by which he decreed khas possession of certain reformed and accreted chur lands in favour of the plaintiff. The plaintiff is a zamindar and the lands in question are admittedly within his zamindari. The existent lease of the lands having, as he contended, expired, he gave the necessary notice to terminate the tenancy. The appellants plead that they are occupancy tenants and as such entitled to maintain possession under the terms of Act X of 1859 (the Bengal Lands Act).

The appellants are the successors by transfer to the firm of Jardine, Skinner & Co., who were prior to 1864 in occupancy of the lands, the zamindar at that time being the respondent's father, to whom he has succeeded. In that year the respondent's father raised an action against Jardine, Skinner & Co., claiming the lands in question. That suit was compromised. At the same time Jardine, Skinner & Co. took a lease of the whole taluk within which the lands were situated. Pottah and kabulyat were executed. The kabulyat executed by the Manager of Jardine, Skinner & Co. bears as follows :—

> " I having applied for a temporary ijara settlement of all the mahals, etc., appertaining to your zamindari and putni taluk . . . you grant me an ijara settlement and ijara pottah for a term of eight years from 1271 to 1278 B.S., fixing Rs. 7,500 as the annual rent, exclusive of collection charges."

The kabulyat then proceeds to incorporate the settlement as follows :—

> " You have instituted against me a suit, No. 19 of 1864, in the Sudder Amin Adalat of the district of Murshidabad, claiming a 4 annas 13 gundahs 1 kara 1 krant share of the reformed and accreted chur lands of Bajupur,

Krishnapur, Dinurpara alias Manick Chuck, appertaining to taraf Bangsibadanpur, and a 7 annas share of the reformed and accreted chur land of Ashariadaha appertaining to pergunnah Kazirhatta. Creating a jote of the same and fixing Rs. 1,300 as its yearly rent, you include the same also in the aforesaid ijara rent. In respect of the same, the stipulation is that after the expiry of the term of this ijara, pottah and kabulyat will be given and taken, settling the rent of the aforesaid chur land in your nij share, at a fair rate, according to the proper rate prevailing in the villages, either amicably and (or) by suit; that until you settle the rent in the aforesaid method, according to the proper rate prevailing in the villages, I will pay up to that time the aforesaid yearly rent of Rs. 1,300 in twelve monthly instalments as per kistbandi, and in default of any kist, I will pay interest at Re. 1 per cent. per month, and that if after the fair rent is settled according to the proper rate prevailing in the villages I refuse to pay that rent, then you will bring the lands under your khas possession by evicting me therefrom; and I shall not be able to make any objection to the same."

The case accordingly depends upon the proper interpretation of this clause in the ijara. The learned Judges of the Court of Appeal have held that the clause is practically indistinguishable from the clause which was the subject of decision by this Board in the case of *Jardine, Skinner & Co.* v. *Rani Surut Soondari Debi* (5 I.A. 164). There, as here, there was a lease of other lands besides the lands in question, and the words of the kabulyat are as follows :—

"Having fixed a yearly rent of Rs. 609 4a. for your nij share of 20,950 bighas, describing them as per boundaries given in the schedule below, you have included it in the aforesaid ijara rent of Rs. 4,417 9a. 5r. I shall be in possession of the said chur as a jote. Upon the expiration of the term of the ijara of the said mahals, a pottah and kubulyat will be respectively given and taken in respect of the jote, regard being had to the quantity of land and amount of rent that shall be determined to belong to your nij share in accordance with the productive power of the land within the area determined by a measurement of the said chur. If I do not take a pottah and give a kubulyat within two months after the fixing of the rate of that land, you will make a settlement with others."

In that case, as here, Messrs. Jardine, Skinner & Co. claimed to be occupancy tenants, but the High Court and this Board negatived that contention, and held that the agreement merely amounted to a right of renewal, and did not create either an occupancy right or vest in the defendants a new term of years.

Now if the clause in that case be compared with the clause in this it will be seen that it is for all practical purposes identical. The clause employes the term "jote," and speaks of a "nij" share. "Jote" is a general term, and is not necessarily equivalent to "rayati jote." In the present case it is shown in another place that the term "rayati jote" is used when an undoubted right of occupancy is being dealt with. The only distinction that can be drawn between the clause in that case and in this is that a special covenant is inserted in this case fixing the old rent of Rs. 1,300 as the rent to be paid on holding over till such time as a new rent is fixed, while in the other case there is silence as to this. But this covenant is nothing more than an expression of what the law would hold without it and cannot, in their Lordships' opinion, alter the general construction of the document.

The appellants' counsel further urged that the present case was not ruled by the other because he said that in this case there was an antecedent occupancy right, whereas there was no such in the other case, and that in the light of that fact the agreement must receive a different interpretation. To make good such an argument the onus is obviously on the appellants to prove such an antecedent right. In their Lordships' view, they fail to do so, for several reasons. In the first place, they bring no clear proof on the subject. But, further, there is a very significant proceeding in a litigation which arose between the parties in 1877. That was after the expiry of eight years from 1864, and the respondent's father sued for khas possession. The defendants, Jardine, Skinner & Co., pleaded (1) an occupancy right, and (2) that the suit was premature, no attempt having been made to settle the terms of a new lease under the right to get a renewal for one more term. The Subordinate Judge held that there was no occupancy right, but that the suit was premature. Appeal was taken to the High Court, and they, in affirming the judgment, said as follows, after expressing the view that the action was premature :—

> " If the respondents (defendants) had been satisfied with this judgment, we should have been inclined to dismiss the appeal with costs, but notwithstanding the suggestion of the Court, the Government pleader who appears for the tenants thought it advisable to lay before us a cross-appeal. That cross-appeal is against the finding of the Lower Court that the defendants had not a right of occupancy in this land. It was contended that they had such right of occupancy, because the land leased to them is called a jote, and because from the date of the lease granting them that jote down to the present time they have occupied it for twelve years and upwards, and consequently must be regarded as having a right of occupancy. It seeems to us that if there is anything clear in regard to a right of occupancy as defined by Act X of 1859, it is a right accruing to a raiyat and not to persons who are middlemen. It would be, we think, a monstrous straining of the law to apply the term ' right of occupancy ' to such an estate as this."

Their Lordships do not consider that this will found an actual plea of *res judicata*, for the defendants, having succeeded on the other plea, had no occasion to go further as to the finding against them ; but it is the finding of a Court which was dealing with facts nearer to their ken than the facts are to the Board now, and it certainly creates a paramount duty on the appellants to displace the finding, a duty which they have not been able to perform.

Lastly, there is the internal evidence from the ijara itself, where the jote is said to be created—an expression little suited to the recognition of a pre-existing right.

On the whole matter their Lordships agree in all points with the judgment of the learned Judges of the Appellate Court, and they will humbly advise His Majestry to dismiss the appeal with costs.

In the Privy Council.

THE MIDNAPUR ZAMINDARI COMPANY, LIMITED

v.

KUMAR NARESH NARAYAN ROY

DELIVERED BY LORD DUNEDIN.

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