

(1923) 01 PAT CK 0016
In the Patna High Court
Case No : F.A. No. 36 of 1920

Kesho Prasad Singh Bahadur (Maharaj)	APPELLANT
Vs	
Babu Parmeshri Prasad Singh and another	RESPONDENT

Date of Decision : 09-01-1923

Acts Referred:

Citation : (1923) 01 PAT CK 0016

Final Decision : Allowed

Judgement

Das, J.—This was a suit by the appellant to recover possession of certain lands at present in the possession of defendants and for mesne profits. The disputed lands admittedly lie within the plaintiff's zamindari, and it is the plaintiff's case that they are his zeraït lands in which the defendants could not in law and have not in fact acquired a right of occupancy. The defendants resisted the plaintiff's suit on the ground that they have acquired such a right in the disputed lands. It is not disputed that the Raj, of which the plaintiff is the proprietor, settled the disputed land with Babu Kesho Prasad Singh, the father of the defendants, for 7 years, from 1309 to 1315, by a lease dated the 25th November 1902. It is also not disputed that upon the expiry of the lease the lands were again settled with the defendants by a lease dated the 8th December 1908 from 1316 to 1324. The defendants have accordingly been in possession of the disputed lands for over 12 years and have undoubtedly acquired a right of occupancy therein, unless the plaintiff is right in his contention that the disputed lands are the proprietor's private land within the meaning of S. 120 of the Bengal Tenancy Act. The learned Subordinate Judge has come to the conclusion that the plaintiff has failed to prove the zeraït character of the lands and has accordingly dismissed his suit.

2. In order to succeed it is necessary for the plaintiff to prove either that the disputed land was cultivated by the proprietor himself as zeraït with his own stock or by his own servants or by hired labour for 12 continuous years immediately before the passing of the Bengal Tenancy Act, or that the land is recognised by village usage as proprietor's private land. It is not the case of the

plaintiff that he or his predecessors in title cultivated the disputed lands as zeraif lands with his own stock, or by his own servants, or by hired labour for 12 continuous years immediately before the passing of the Bengal Tenancy Act. But the plaintiff contends that the disputed lands are recognised by village usage as proprietor's private land. The Bengal Tenancy Act has laid down certain rules for the guidance of the Revenue Officers for the determination of the question whether the lands claimed as proprietor's private lands are in fact proprietor's private lands. These rules are to be found in S. 120, para. 2 of the Bengal Tenancy Act and are as follows:-

In determining whether any land ought to be regarded as a proprietor's private land, the officer shall have regard to local custom and to the question whether the land was before the 2nd day of March 1883, specifically let as proprietor's private land, and to any other evidence that may be produced, but shall presume that land is not a proprietor's private land until the contrary is shown.

In para. 3 it is provided that "if any question arises in a Civil Court as to whether land is or is not a proprietor's private land, the Court shall have regard to the rules laid down in S. 120 for the guidance of Revenue Officers."

3. It has been the subject of some controversy in our Courts whether the circumstance that a landlord has, subsequent to the 2nd day of March 1883, specifically let out the land as his private land can at all be regarded by the Courts as relevant evidence as coming within the words "any other evidence that may be produced." In *Nilmoni Chuckerbutti v. Bykunt Nath Bera* (1899) 17 Cal. 466 it was held by the Calcutta High Court that such evidence is wholly irrelevant and should not be considered by the Court. Their Lordships in the course of their judgment stated as follows:-

It seems to us that in enacting that sub-section, the Legislature had before it the attempts which might be expected on the part of landlords to frustrate the intention of the Legislature, as asserted in the Draft Bill laid before the Council for consideration to extend the occupancy rights of tenants before the measures then declared to be in contemplation became law; and therefore the particular date, the 2nd day of March 1883, the date on which the Draft Bill was published in the Gazette, and leave was obtained to introduce the Bill into the Council, was declared to be the latest date on which there should be free action on the part of zemindars to assert their private rights, so as to prevent the accrual of special tenant rights. It was accordingly declared that it was a material point, in the consideration of such a matter as is now raised in appeal before us, whether the particular lands were before the 2nd day of March 1883, specifically let as the proprietor's private lands. From this, we may take it, that it was intended that regard should be had to any declaration made before that date by the landlord and communicated to the tenants in respect to the reservation of the proprietor's right over the land as his private land. In this view, we think that the following words in that sub-section "any other evidence that may be produced" must mean any other evidence tending in the same direction that may

be produced to show the assertion of any title on the part of the proprietor, and communicated to the tenant before that date.

4. In my opinion there is nothing in S. 120 itself to out down the generality of the expression "any other evidence that may be produced" used by the Legislature in S. 120, para. 2 of the Bengal Tenancy Act. If it were the intention of the Legislature to exclude such evidence as may be furnished by the dealings between landlords and tenants subsequent to the 2nd day of March 1883, it should have expressed that intention in more dear terms. As S. 120 stood at the time when the Act was passed, it allowed the Court to consider "any other evidence that may be produced" in connection with the question whether the land claimed as zerait was in fact zerait. The Evidence Act deals with the question what evidence is relevant evidence, and in my opinion there is no power in the Court to reject any evidence as irrelevant evidence if the landlord offers that evidence, and the Evidence Act says that it is relevant evidence. This was the view which was taken by Mr. Justice Mitter in the case of Bhagtu Singh v. Raghunath Sahai (1903) 13 C.W.N. 135: 9 C.L.J. 15: 1 I.C. 571. He was definitely of opinion that S. 120 does not exclude evidence which under the Evidence Act is relevant evidence. But it is suggested that, quite apart from the question whether Mr. Justice Mitter was right in the view which he expressed in the case of Bhagtu Singh v. Raghunath Sahai (1903) 13 C.W.N. 135: 9 C.L.J. 15: 1 I.C. 571 the Legislature by the subsequent amendment of the Act, has specifically stated that such "evidence is not to be regarded by the Courts as relevant evidence on the question whether the land claimed as zerait is in fact zerait. This amendment has been carried out by enacting a new para, in S. 120 of the Bengal Tenancy Act, 2-A which runs as follows:-

Notwithstanding anything contained in any agreement or compromise, or in any decree which is proved to his satisfaction to have been obtained by collusion or fraud, a Revenue Officer shall not regard any land as a proprietor's private land, unless it is proved to be such by satisfactory evidence of the nature described in sub-S. (1) or sub-S. (2).

5. Now it seems to me that a demise on the footing that the land demised is the proprietor's private land is hardly an agreement or compromise within the meaning of the terms as used in para. 2-A, but quite apart from any other consideration, it seems to me that the agreement or compromise which the Revenue Officer is not to regard, is an agreement or compromise made before the Revenue Officer in a proceeding connected with the record of rights and but for the difficulty arising from the comma being placed after the word "compromise" and not after the word "decree" I should feel inclined to hold that before a Revenue Officer disregards an agreement or compromise, he must be satisfied that it was obtained by collusion or fraud. The object of the new subsection was, as the report of the Select Committee on the Bill of 1907 makes clear, to assert the principle that agreements or compromises made before a Revenue Officer should not be held to affect the rights of third parties. It was

thought that the question whether the land is proprietor's private land, affects not merely a tenant for the time being but also all future occupants of the lands and the Legislature considered it desirable to safeguard their interests as far as possible. But it is one thing to frame rules for the guidance of Revenue Officers, it is another thing to tell the Civil Courts that they are not to regard as evidence that which is evidence under the Evidence Act. The last para, of S. 120 undoubtedly says that the Civil Court is to have regard to the rules laid down in S. 120 of the Bengal Tenancy Act for the guidance of the Revenue Officer whenever any question arises in a Civil Court as to whether land is or is not a proprietor's private land but there is nothing in S. 120 which tells the Civil Courts definitely and clearly that they are to exclude from their consideration that which is relevant evidence under the Evidence Act, and which they are bound to regard under S. 120 para. 2 of the Act. In my opinion the landlord is entitled to rely upon any evidence that may be produced to show the assertion of any title on his part and communicated to the tenant whether before the 2nd day of March 1883 or after that date. All such evidence is relevant evidence under the Evidence Act and is admissible as such, though it may be that such evidence standing by itself will be of small value and will not induce the Courts to hold that the land claimed as proprietor's private land is in fact the proprietor's private land. If there is any evidence of an assertion of a title on the part of the landlord and communicated to the tenant before the 2nd day of March 1883, the matter is conclusive under the Bengal Tenancy Act, but if the evidence is to the effect that there was an assertion of a title communicated to the tenant after the 2nd day of March 1883, that evidence will not be conclusive on the question whether the land claimed as zeraib is in fact zeraib land, although as I suggest, it is open to the Court to take that evidence into consideration in coming to the conclusion whether the land claimed as zeraib is in fact zeraib land.

7. The dealings of the plaintiff or his pre-decessors-in-title with the disputed lands are as follows:-

In or about the year 1843, the Raj settled certain lands including the lands set out in Sch. A annexed to the plaint with the Government for the purposes of a stud. There is evidence that the Government through its officers used to grow oats on the lands demised and was in possession for about 30 years. In 1873, the Government surrendered these lands to the Raj. In the same year the Raj settled the Sch. A lands with one Mr. Fox by a lease from 1873 to 1884. In 1894 the Raj granted another lease to Mr. Fox from 1884 to 1892. Sometime in 1891, in consideration of valuable services rendered by Mr. Fox to the Raj, the Raj conferred occupancy rights in the lands demised upon Mr. Fox. In 1895, the Raj brought a suit, being suit No. 10 of 1895, against Mr. Fox for arrears of rent from 1299 to 1302. The Raj recovered a rent-decree as against Mr. Fox, and in execution of that decree caused the lands in dispute to be sold, and purchased the lands at the auction-sale held on the 2nd of March 1896 The Raj then settled the 3ch. A lands with one Akhoura Ram Adaraj Singh from 1897 to 1901. Meanwhile the Sch. B lands had come out of the water, and had become fit for

cultivation, and in 1902 the Raj settled the disputed lands with Kesho Prasad Singh, the father of the defendants for 7 years from 1902 to 1908, and in 1909 the Raj executed another lease in favour of the defendants which expired in 1324.

7. Now it will appear that though the Raj has not been in actual cultivating possession of the lands from 1843, it has always let out the lands for terms of years and that though the Government was in possession under the leases for about 30 years, it was not suggested that any right of occupancy was acquired in the disputed lands by the Government. In the earlier documents the lands are described as diara lands; and though diara lands are not by operation of law zeraif lands, there is sufficient in the literature connected with the Bengal Tenancy Act to indicate that there were local customs in various parts of Bihar under which diara lands were recognised as zeraif lands. Indeed the papers which have been published under the authority of the Government relating to the Bengal Tenancy Act establish that the Bihar Zemindars pressed before the Government the importance of saving such local customs as recognised lands as proprietor's private lands and the provisions in the Act saving the local customs was a concession to the Bihar Zemindars who contended that local customs would in many places support their claim where they might otherwise fail to establish the zeraif character of the land. The Bengal Tenancy Act has certainly conferred special privileges on the landlords in regard to the diara lands; and it seems to me that, apart from any other consideration, the community may regard the diara land as the proprietor's private land, since it is not land in which any tenancy rights have ever been exercised. I am of course not considering the case where such land is identifiable with previously existing tenancy lands, and of course I am not suggesting that such land, where it is not identifiable with previously existing tenancy lands, is by law proprietor's private lands. All that I suggest is that it is likely that local customs may give such land to the landlord as his zeraif, if it is not identifiable with previously existing tenancy land. I do not regard the history of the dealings of the disputed lands by the Raj prior to the passing of the Bengal Tenancy Act as establishing the case of zeraif, but I think that it makes the case of the plaintiff a probable one. It is quite certain that certainly up to the passing of the Bengal Tenancy Act, no one had claimed a right of occupancy in these lands although they were constantly let out to tenants. Mr. Fox himself was in possession of these lands from 1873 to 1896. In 1891, the Raj solemnly conferred upon Mr. Fox a right of occupancy in these lands. Now it will be noticed that in 1891 Mr. Fox had already been in possession of the disputed lands for over 12 years; and if a right of occupancy could be acquired in these lands, Mr. Fox had certainly acquired it. Now if Mr. Fox was aware of the fact that the lands were not the proprietor's private lands, it is certainly remarkable that he should have asked the Raj to confer a right of occupancy upon him in these lands. I shall have to consider the effect of the transaction by which the Raj recognised Mr. Fox as an occupancy-tenant, and whether such recognition had the effect of converting the zeraif lands into raiyati lands, but it is necessary at this stage to point out that the transactions between the Raj and

Mr. Fox make the case of the plaintiff antecedently probable.

8. I now come to the actual evidence produced by the plaintiffs to establish the zerait character of the lands. The evidence consists of certain kabuliyats executed in favour of the Raj and of the proceedings in certain suits instituted by the defendants against Parbhu Upadhya and others. Ex. 5 is the kabuliyat executed by Mr. Fox in favour of the Raj on the 21st June. 1883. By this document Mr. Fox covenanted with the Raj that on the expiry of the lease the Raj would be entitled to the land as its seer zerait. In my opinion the declaration made by Mr. Fox before the passing of the Bengal Tenancy Act is important evidence in favour of the Raj, though the covenant would have been conclusive if the demise had taken place on or before the 2nd day of March 1883. The learned Subordinate Judge thought that the document was not properly proved, as only a certified copy was produced and neither the record-keeper nor the moharrir who made a search for the original was called to prove the loss of the original document, but the learned Subordinate Judge did not reject the document when it was tendered. P.W. No. 5 has given some evidence in support of the plaintiff's case that a search was made for the document. The objection of the learned Subordinate Judge is to the mode of proof and not to the relevancy, and in my opinion it was the duty of the learned Subordinate Judge to reject the document if he thought that the proof was insufficient. If he had rejected the document on the ground that there was no proof as to the loss of the original, it would have been open to the plaintiff to adduce proper evidence to prove the loss of the original document. That course was not adopted by the learned Subordinate Judge, and in my opinion the document having been admitted, it is not open to the defendants to contend that it was not properly admitted in evidence.

8. The next document is a kabuliyat executed by Kesho Prasad Singh, the father of the defendants, on the 25th November 1902. By this transaction the lands were specifically let out as zerait lands, and the tenant acknowledged the demised lands to be zerait lands. The other kabuliyat was executed by the defendants through their mother on the 8th December 1908. Here again the lands were specifically let out as zerait land. In my opinion all these kabuliyats are undoubtedly evidence in favour of the plaintiff; though I quite agree that if these kabuliyats stood by themselves and if there was nothing else in the case, they would be quite insufficient for the purpose of establishing the plaintiff's case.

9. I now come to the most important evidence in favour of the plaintiff. In 1910 the defendants had to institute certain suits against certain persons who were undoubtedly the tenants of the Dumraon Raj and who had encroached upon portions of the disputed lands and asserted a right of occupancy in these lands. There were various criminal proceedings preliminary to the Civil suits, and it appears that in a proceeding under S. 107, Criminal Procedure Code, the present defendants were defeated. They accordingly filed suits to eject these persons from the disputed lands, and they alleged in their plaint that the lands were

zerait lands and were recognised as such by village custom. It was argued before us that it was wholly unnecessary for the defendants, who were the plaintiffs in those suits, to make a case that the lands were recognised by village custom as zerait lands, and that in any case the admission made on behalf of the defendants, who were then minors, ought not to bind them in this suit, and it was strongly insisted that a guardian can make no admission so as to bind the minors, if the admission is prejudicial to the interests of the minors. In my opinion the allegation was a necessary allegation and was essential to the case of the defendants. It must be remembered that the persons against whom those suits were brought were undoubtedly the tenants of the Raj, and were actually in possession of the disputed lands. Their case was that they had been properly inducted into the lands, and that they had acquired a right of occupancy in the lands. The defendants, the plaintiffs in those suits were in this difficulty that if those persons proved their settlement, the judgment of the Court would undoubtedly be in their favour, unless it could be shown that the rights of occupancy could not be acquired in these lands. It was therefore necessary for them to allege and prove that the lands were zerait lands in which rights of occupancy could not be acquired. Nor do I look upon the allegations as admissions which should not bind the minors. An admission which ought not to bind a minor is an admission suggesting an inference which prejudices the case of the minors in the proceeding in which the admission is made. But though the allegations made in those suits are undoubtedly prejudicial to the defendants in this suit, they were made in their interests in those suits and, as I have said, they were essential to the success of their suits.

10. It was then suggested that those allegations were introduced into the plaints in the interest, of the Raj by Brahamdeo Singh who was the tehsildar of the Raj and was the karpardaz of the defendants. Not only is there not an iota of evidence in support of this allegation, but the surrounding circumstances are wholly in favour of the plaintiff. The Raj was then in the charge of the Court of Wards, and it is improbable that the Collector should have entered into a fraudulent conspiracy with Brahamdeo Singh for the purpose of establishing the zerait character of the lands. In my opinion, the allegations made by the defendants in those suits strongly support the case of the plaintiff that the disputed lands are recognised by village custom as proprietor's private lands.

11. Ex. 7 is the judgment of the Subordinate Judge in those suits and it shows, not only that an issue was raised on the question whether the lands claimed in those suits were zerait lands, but that the Court held that "at the time of the suit and before that, the lands were strictly zerait". No doubt the Court also held that Mr. Fox had acquired a right of occupancy in those lands; but the finding of the Court is definite that the lands were initially zerait and were undoubtedly zerait at the time of the passing of the Bengal Tenancy Act. I shall presently consider the effect of the transaction by which the Raj recognised Mr. Fox as an occupancy tenant; but it is necessary to point out at this stage that not only did the defendants make the definite case that the lands were the zerait of the Raj

but that the Court found in favour of the defendants and gave them a decree for possession on the footing that the lands were initially the *zeraif* of the Raj. In my opinion the plaints filed by the defendants in those suits Exs. 6, 6a, 6b, and 6c, the judgment delivered by the Subordinate Judge in those suits, Ex. 7 together with the *kabuliyats* Exs. 2, 3 and 5, are sufficient for the purpose of establishing the plaintiff's case that the disputed lands are the proprietor's private lands in which the defendants could not acquire a right of occupancy.

12. Now how do the defendants meet the case of the plaintiffs? They have adduced no evidence whatsoever, either oral or documentary; but they contend that the transaction by which the Raj conferred the status of occupancy tenant on Mr. Fox operated as a conversion of the *zeraif* land into *raiya* land, if the land was ever the *zeraif* land of the proprietor, which of course they dispute. They strongly rely upon the act of the Raj in conferring the status of an occupancy tenant upon Mr. Fox and upon the fact that the Raj sued Mr. Fox as an occupancy tenant; and they contend that the whole transaction, ending with the purchase of the occupancy holding by the Raj, shows that the Raj lost its title to the land as *zeraif* land by treating it as *raiya* land.

13. Mr. P.K. Sen, to whom we are much indebted for his very interesting argument, contends, on the other hand, that an occupancy right is the creature of statute and that such right could not be conferred on Mr. Fox and that the transaction was wholly ineffectual so as to bring that right into existence. He also contends that there is no foundation for the argument that the Raj by its conduct threw the *zeraif* land into the stock of *raiya* land, and that, assuming that the transaction was valid in so far as it conferred a right of occupancy in the lands upon Mr. Fox, its effect was not to convert the land into *raiya* land, though it may be that Mr. Fox and all persons claiming through him might have defended their title as occupancy tenants against any attempt on the part of the Raj to eject them. The argument raises the question whether a grant by the landlord is recognised by the statute as one of the modes by which occupancy rights are brought into existence. The regulations of the Bengal Code dealt with only two classes of *raiya*s, the *khudkasht* and *paikast*. The *khudkasht* *raiya* of the Regulations was a cultivator who held lands as an agriculturist in the village in which he had his fixed residence. It is unnecessary to enter into an investigation as to the origin of these *raiya*s; but it is more or less accepted now that a *khudkasht* *raiya* was a member of the community comprising the village, cultivating land of the village, having his homestead in the village. It is quite certain that his rights were not acquired by the contract between him and the landlord, but were inherent in his status, and that the status was acquired by residence and not by any grant. A *paikast* *raiya* on the other hand was a tenant who held the land in one village residing in another. His rights were such as were conferred on him by contract. He had no status, and the Bengal Regulations did not attempt to afford any protection to him and he was liable to be ejected at the end of any agricultural year, or at the termination of his lease. This was the position when Act X of 1859 came into operation. It abolished the distinction

between khudkasht and paikast raiyats, and brought into existence three classes of tenants namely (1) raiyats holding at fixed rent from the time of the permanent settlement, (2) raiyats holding land for periods exceeding 12 years who for the first time were called occupancy raiyats and (3) non-occupancy raiyats holding for periods of less than 12 years. The khudkasht raiyats fell within either the first or the second class; but it is obvious that, the legislature having deliberately made up its mind not to apply the test of residency, the Act operated as a great hardship on raiyats who were undoubtedly resident raiyats but who had not completed their 12 years of residence or who had been shifted from holding so as to prevent them from acquiring the status of occupancy tenants. But even under Act X of 1859 the rights of occupancy were the incidents of status, the status acquired by cultivating the land for 12 years and paying the rent payable on account of the same. There is no suggestion in Act X of 1859 that such a status could be conferred by grants; and indeed in the long and careful investigation that took place preliminary to the introduction of the Bengal Tenancy Act, it was ascertained that "the law," that is to say the law up to the passing of the Bengal Tenancy Act, "was silent as to the acquisition of such rights by contract" (see paragraph 36 of the Rent Commissioner's report). It is important to remember that provision was made in S. 48 of the Draft Bill of Sir Ashley Eden for acquisition of occupancy rights by grant, but that the Act as finally passed did not contain such a provision. In this connection it is interesting to turn to the letter No. 972/T, dated the 27th September 1883, from the officiating Secretary to the Government of Bengal, Revenue Department, to the Secretary to the Government of India, Legislative Department. This letter will be found at Page 215 of the "Selection from Papers relating to the Bengal Tenancy Act, 1885," published by the Bengal Secretariat Press, and the passage which I am reading will be found in Para 12 of the letter, at p. 223. Dealing with S. 48 of the Draft Bill and with the objection to the retention thereof in the statute book, the Bengal Government said as follows:-

With regard to S. 48, the Government of India will perceive from the local reports that some officers oppose the retention of the section in the Bill, because for instance, it might be made the means of depreciating the value of an estate sold for arrears of revenue. To this view by itself the Lieutenant-Governor does not attach much importance, because the establishment of a substantial peasant proprietary should enhance, and not depreciate, the value of an estate. There are risks, however, connected with the concession of such a power, inasmuch as it might be used as a means of bargaining by zemindras with parties whom they wished to favour on receipt of valuable consideration, and of defeating accrual of the right of occupancy of the rightful cultivator who may have been in possession for 10 or 11 years. Mr. Rivers Thompson agrees with the Hon^{ble} Mr. Reynolds in thinking that the occupancy right, being inherent in the status of the raiyat, is not the landlord's right? to grant; and further, that no necessity has been made out for introducing into the Bill a principle which is foreign to the law of Bengal.

14. I now come to the Bengal Tenancy Act and in dealing with the relevant

sections of the Bengal Tenancy Act, it will be necessary to bear in mind that the acquisition of occupancy rights by grant was, up to the passing of the Bengal Tenancy Act, foreign to the law of Bengal. S. 19 of the Act runs as follows:-

Every raiyat who immediately before the commencement of this Act or the Bengal Tenancy Amendment Act 1907 has, by the operation of any enactment, by custom, or otherwise, a right of occupancy in any land, shall, when that Act or the Bengal Tenancy (Amendment) Act, 1907, comes into force, have a right of occupancy in that land.

15. This section does no more than save and preserve such rights of occupancy as were already acquired either by the operation of any enactment, or by custom or otherwise, and it certainly does not provide a new mode for acquisition of such rights. It was contended before us that the use of the word "otherwise" is sufficient to show that, in the view of the Legislature, there existed modes for acquisition of occupancy rights other than by the operation of any enactment or by custom. The argument in my opinion ignores the method universally adopted by the Legislature when it has to save and conserve rights already acquired before a particular legislation is introduced. The Bengal Tenancy Act does not pretend to enumerate the different modes by which rights of occupancy could be acquired at the time when the Act came into force; it merely saves such rights as had already been acquired. If such rights had been acquired by any person by grant at the time when the Bengal Tenancy Act came into operation, they were undoubtedly saved by S. 19; but in order to determine whether such a right could be acquired by grant, we have to go to the law as it existed prior to the passing of the Bengal Tenancy Act, and I think that I have shown that acquisition of occupancy rights by grant were wholly foreign to the law of Bengal.

16. S. 19, as I have said, saves and preserves such rights as were in existence at the time when the Bengal Tenancy Act came into operation. Ss. 20 and 21 are an attempt to rehabilitate the khudkasht or resident raiyat of the Bengal Regulations. S. 20 brings into existence a new raiyat called the settled raiyat and it provides that "every person who, for a period of 12 years, whether wholly or partly before or after the commencement of the Act, has continuously held as a raiyat land situate in any village, whether under a lease or otherwise, shall be deemed to have become, on the expiration of that period, a settled raiyat of that village." The different paragraphs of S. 20 made great changes in the Rent Law as it existed at the time when the Bengal Tenancy Act came into operation; but it is necessary to remember that it is the occupation of the land in the village for 12 years, whether by himself or by his heirs, that conferred upon the person the status of a settled raiyat. S. 21 provided that "every person who is a settled raiyat" of a village within the meaning of S. 20 "shall have a right of occupancy in all" lauds for the time being held by him as "a raiyat in that village." Now there is nothing in either S. 20 or S. 21 or in any other section in the Bengal Tenancy Act which provides that a right of occupancy can be acquired either by grant or by contract. It was insisted that it is part of the general law that a person may make

a grant of his property if he chooses, and we were asked to consider whether there is anything in the Bengal Tenancy Act which takes away from the landlord the right to make a grant of his property in favour of a tenant. The reply is that a grant can only operate on property in existence and that until the right itself is acquired there is no property in the contemplation of law on which the grant can possibly operate. In my opinion an occupancy right is inherent in the status, of the raiyat and is not the landlord's right V to grant.

17. In this view the transaction between the "Raj and Mr. Fox did not operate to bring into existence in favour of Mr. Fox a right of occupancy in this land; but conceding that the status could in law and was in fact conferred on Mr. Fox, I do not think that there is any warrant for the view that by such grant the character of the land was changed. There is certainly no warrant for this view in the Bengal Tenancy Act. The argument proceeds, as it must proceed, on the admission that the disputed land was initially zerait and was zerait at the time when the Bengal Tenancy Act came into operation. The whole object of the Bengal Tenancy Act was to prevent the landlord from increasing the stock of zerait land in existence at the time the Bengal Tenancy Act came into operation; but there is no indication in the Act itself that if, as a result of the bounty of the landlord, a person acquires a right of occupancy in the zerait land, there is, as a consequence of such bounty, the conversion of the zerait land into raiyati land. It was argued that the Raj purchased the land as raiyati land in execution of its decree against Mr. Fox. That may be so, but the effect of acquisition of Mr. Fox's right by the Raj was that the entire interest of the Raj and of Mr. Fox in the disputed land became united in the Raj and under S. 22(1) of the Act the Raj would have no right to hold the land as a tenant but could only hold it as a proprietor. It is quite true that ordinarily when a landlord purchases occupancy holdings of the tenants he holds them, not as zerait, but, to use a term well known to the revenue officers, as bakasht: but that is because the landlord is unable to show that the lands were at any time the proprietor's private land; and the law does not permit him to increase his stock of zerait land. But the case is entirely different where the lands were initially zerait. It may be that for a time they were severed from the parent stock; but there is no reason whatever why the land should not come back to the original stock when the proprietor recovers those lands. In my opinion whenever the question is raised as to the character of the land purchased by the landlord from the tenant, the enquiry must be directed to ascertain the original character of the land. If it was initially raiyati land, the landlord, in getting khas possession, cannot treat it as his zerait; for to permit him to do so would be to allow him to increase his stock of zerait land, which it was the object of the Bengal Tenancy Act to prevent. But where it is proved that the land was zerait land within the meaning of S. 120 of the Bengal Tenancy Act, the land, on coming into the khas possession of the landlord, regains the character which it once possessed. In my opinion the transaction by which the Raj conferred occupancy rights in the disputed lands did not have the effect of converting the zerait lands into raiyati lands. That being so, the defendants have

not acquired the right of occupancy in these lands as it is conceded that their tenancy began with a lease for years.

18. I would accordingly allow this appeal, set aside the judgment and decree passed by the Court below, and give the plaintiff a decree for possession of the disputed lands with mesne profits and costs throughout.

Kulwant Sahay, J.

19. I agree.