

(1874) 04 CAL CK 0005
In the Calcutta High Court
Case No : Regular Appeal No. 27 of 1873

Narendra Narayan Roy Chowdhry

APPELLANT

Vs

Ishan Chandra Sen

RESPONDENT

Date of Decision : 22-04-1874

Acts Referred:

Citation : (1874) 04 CAL CK 0005

Judgement

Sir Richard Couch, Kt., C.J.—In the judgment, by which this case is referred to us, it is found that Krishna Das was a ryot, and that he continued to be so down to the time when he sold his tenure to the defendant. The way in which the case comes before us does not allow us to consider whether Krishna Das really was a ryot or not. We must take the fact as found by the two learned Judges. I wish to prevent its being assumed that, upon the facts which appear in this case, I should have found that he was a ryot. The first question put to us is, whether the right of occupancy which Krishna Das had at the time of the sale to the defendant was transferred to him?

2. This is a question which must be considered and answered independently of any custom. In answering it I wish particularly to be understood as not giving any opinion respecting rights of occupancy where there is a custom to transfer them. In these cases the landlord or zemindar may be supposed to have allowed the ryot to occupy according to the custom. If the ryot has by custom a right to transfer, the landlord may be supposed to have assented to the right of occupation which he gave to the ryot being transferred by him. There may be many cases in which a ryot may have a right by custom to transfer. We must exclude all these from consideration in answering this question.

3. In my opinion it is to be answered solely with reference to the words of s. 6 of Beng. Act VIII of 1869, by which the right is given, not for the first time, but on which it now depends. And whether, when Act X of 1859 was passed, this was the creation of a new right in a ryot, or the recognition by the Legislature of an existing custom to allow the ryot to continue to hold, does not make any

difference in the construction of the Act. If the Act creates a new right, we must look at the words of it for what the right is, and if it recognizes a custom, it recognizes it only to the extent expressed, and the result is the same.

4. The words of the section are that "every ryot who shall have cultivated or held land for a period of twelve years shall have a right of occupancy in the land so cultivated or held by him, whether it be held under potta or not, so long as he pays the rent payable on account of the same; but this rule does not apply to khamar, nijjote, or seer land belonging to the proprietor of the estate or tenure, and let by him on a lease for a term, or year by year, nor (as respects the actual cultivator) to lands sublet for a term, or year by year, by a ryot having a right of occupancy. The holding of the father or other person from whom a ryot inherits shall be deemed to be the holding of the ryot within the meaning of this section."

5. These words appear to me to point to a ryot having the right in land cultivated or held by him, and so long as he pays the rent, and to the right not being one which can be transferred to some other person. It is a right to be enjoyed only by the person who holds or cultivates and pays the rent, and has done so for a period of twelve years. It does not speak of his acquiring a right which he might, having acquired it, transfer or make use of as a subject of property, but it seems intended to secure to a ryot who has cultivated or held for twelve years a continuance of his cultivation or holding so long as he pays the rent. And the provision at the end of the section by which the holding of a father or other person from whom the ryot inherits is to be deemed the holding of the ryot, supports this construction, for it appears to show that, except in that particular case, the holding must be entirely by the person who claims the right. This is a law which imposes a restriction upon the proprietary rights of the zemindar or landlord, and a ryot cannot claim under it any thing more than the words clearly give to him. There are not here, in my opinion, words of so doubtful a meaning that we should consider whether it would be just or equitable that the ryot should have the power to transfer. The ordinary construction of the words appears to me to be, that the right is only to be in the person who has occupied for twelve years, and it was not intended to give any right of property which could be transferred. I would therefore answer the first question by saying that the right which Krishna Das had at the time of the sale was not transferable. The question, as I have said, is solely upon the Act, and independent of the existence of any custom.

6. The second question is, whether, if it was not transferred, is it still in existence in Krishna Das or his heirs, and being in existence will it prevent the plaintiff from ejecting the defendant?

7. Now, if a ryot having a right of occupancy endeavors to transfer it to another person, and, in fact, quits his occupation, and ceases himself to cultivate or hold the land, it appears to me that he may be rightly considered to have abandoned his right, and that nothing is left in him which would prevent the zemindar from recovering the possession from the person who claims under the transfer. And

not only may he be considered to have abandoned it, but if the right which is given by the law is one which exists only so long as he holds or cultivates the land, when he ceases to do that, by selling his supposed right and putting another in his place, his right is gone and cannot stand in the way of the landlord's recovering possession. If it were not so, the law would become nugatory. The position of things would be that the transfer by the ryot is invalid, and gives the transferee no right to the possession, but the ryot could not recover possession from the transferee as he would be bound by his act of transfer; nor could the landlord recover possession because, the outstanding right in the ryot would be in his way. The result would be that, although the transfer is invalid, the transferee would be able to keep possession and to set the landlord at defiance. I think in this case it may be considered either that the ryot has abandoned his right altogether, and therefore it cannot be set up as an answer to the suit by the landlord for possession, or that his right has ceased, has been put an end to, because it existed only so long as the ryot himself continued to hold or cultivate the land. I would therefore in answer to the second question say that any supposed right which may be in existence in Krishna Das or his heirs will not prevent the plaintiff from ejecting the defendant.

Jackson, J.

8. I entirely concur in the judgment which has just been delivered, and have very few words to add. I should be inclined to describe the right, whether created or recognized by s. 6 of the Rent Act, as being a right resulting from the connexion between the occupying tenant and the land which he occupies for a space of twelve years. The Act expressly declares that the holding of the father or other person from whom a ryot inherits shall be deemed to be the holding of the ryot; and there I think one may say that the well-known maxim *inclusio unius, & c.*, would apply.

9. As to the second question, the answer appears to me to be very clear, for by the sale out and out to another person, the ryot voluntarily terminates that connexion between himself and the land which he had occupied, which is necessary to the existence of the right of occupancy. The law allows a subletting by a ryot who has a right of occupancy, though it does not permit the growth of a right of occupancy within a right of occupancy. So long as the ryot having a right of occupancy merely sublets the land, he maintains that connexion between himself and the land which is essential to the existence of the right; but when he has transferred his right to another, he no longer maintains that connexion.

10. I wish also to say that I expressly concur in the observations which the Chief Justice made at the outset of his judgment, namely, that we are dealing with this case on the facts found by the learned Judges who referred it, and by that we are limited.

11. There is only one other observation which I wish to make as to the case of *Bibee Sohodwa v. Smith* 12 B.L.R., 82. I do not apprehend that the learned

Judges who decided that case meant to suggest that, after a ryot having a right of occupancy had parted with his right by transfer, and the zemindar had evicted the transferee as having no right to occupy the land, the ryot might afterwards come in and insist upon the right he had voluntarily parted with as entitling him to enter upon the land. If, however, any such claim should hereafter be set up in any other case, it will doubt-less have to be considered.

Phear, J.

12. I entirely concur with the Chief Justice. I understand the questions which are put to us to have reference solely to that peculiar right of occupancy which I may call the creature of s. 6 of the Rent Law, and that in the matter which is now before us, we are entirely disembarassed, as the Chief Justice has said, of all considerations which might affect, or enter into questions relative to the alienation of the right to hold and occupy land, founded on the element of custom, or otherwise. And it seems to me that under this hypothesis the questions which have been put to us in this reference are both immediately answered in the negative, when the view is taken of s. 6, as I think it ought to be, to the effect that the right of occupancy, which is the subject of this section, is rather of the nature of a personal privilege than a substantive proprietary right. I think that there can be no right of occupancy under the terms of this section other than in a person who is cultivating or holding the land as a ryot in the situation which is mentioned in this section; and that therefore a person can only have this right who is actually cultivating or holding the land, and then only if he has cultivated or held the land as a ryot for a period of twelve years, according to the rule for estimating that time which is prescribed in the section; and that rule is that only the actual cultivation or holding of the person who sets up the right, and in the case where he has taken the cultivation or the holding of the land by inheritance from a predecessor, then, constructively, the cultivating or holding of that predecessor counts. The section does not give to any one other than the person who has actually held or cultivated land for the period of twelve years either by him-self alone, or by himself and his predecessor from whom he has taken by inheritance, together, the right of occupation which is the subject of the section. And if this be so, then it seems to be plain upon the facts which the reference brings before us that Ishan Chandra Sen, the defendant in the case, has not a right of occupancy in the land which is the subject of suit, because he has himself only cultivated or held it as a ryot for a period of a little more than eleven years, and the person who preceded him in the cultivation or holding thereof was not one from whom he took it by inheritance. His predecessor in the cultivation or holding was Krishna Das, from whom he took by purchase. In that state of things he is not entitled by the words of s. 6 to add any years of Krishna Das's holding to the years of his own holding. And certainly Krishna Das, in the view that I have taken of the section, can have no right of occupancy in the land, because he is not now cultivating or holding it, but on the contrary has long been out of the occupation of it; he has not cultivated it; he has not held it in any sense whatever during the period of the last eleven years and upwards. To use

the words of the section, he is not a person who is occupying or holding the land.

13. The second branch, also, of the second question which has been referred to us, seems to be answered in the negative by the decision in *Bibee Sohodwa v. Smith* 12 B.L.R., 82, a decision, the correctness of which has not yet been impeached--supported by the decision in *Buti Singh v. Murat Singh Ante*, p. 284.

14. I concur in the judgment which has been delivered by the learned Chief Justice, and have nothing substantial to add to it. I ought, however, perhaps to remark with regard to an observation which has been made on the case of *Bibee Sohodwa v. Smith* 12 B.L.R. 82, that it was obviously not the intention of the Bench which passed that decision to say anything judicially as to whether or not the grantors or transferors of the jute in that case still had, in the events which had happened, any right to require possession of the land at the hands of the zemindar. All that that decision decided was that whatever the rights of the transferors as against the zemindar might be, those rights did not prevent the zemindar, under the circumstances of the case, from recovering possession of the land from a stranger.

Morris, J.

I concur with the Chief Justice in thinking that both the questions referred to us should be answered in the negative.

(1) Before Mr. Justice Bayley and Mr. Justice Mitter.

The 1st February 1872.

Hyder Buksh and Another (Defendants) v. Bhubindro Deb Cowar (Plaintiff).*

Right of Occupancy--Transfer--Act X of 1859, s. 6.

Baboo Debendro Narayan Base for the appellants.

Baboos Doorga Mohun Doss and Bishen Doyal Roy for the respondent.

The judgment of the Court was delivered by

Mitter, J.--We are of opinion that this special appeal ought to be dismissed. In order to establish a right of occupancy, it was necessary for the defendants to prove that they had been in possession of the disputed land continuously for a period of 12 years. The Judge in the Court below has found that they had been in possession for 11 years and 3 months only. It has been argued that the defendants are entitled to add to their own possession the possession of one Jesraj from whom they purchased the land in question. But under the provisions of s. 6, Act X of 1859, it appears to be clear that they are not entitled to do so. "The possession of a father or other ancestor from whom a ryot inherits may be added" in this manner; but not the possession of a vendor. It is true that the zamindar consented to the transfer, but such consent cannot give to the defendants any right higher than that possessed by their vendor, and as it appears from the facts of this case that the vendor was a mere tenant-at-will,

and as, under the provisions of the section referred to, the defendants are not entitled to add to their own possession the possession of their vendor, this ground of appeal must fail.

The other ground as to the extent of the jote of Midni Bewa does not appear to be made out. It is clear from the jama-wasil-baki papers of the time of the Court of Wards, which have been put in by the plaintiff, as well as from other evidence, that Midni Bewa and Kadir Baksh held two distinct jotes, although the former had originally purchased from the latter an undivided half share of his jote.

We therefore dismiss this appeal with costs.

(2) Before Mr. Justice Loch and Mr. Justice Mitter.

The 10th June 1869.

Jamir Gazi and Another (Plaintiffs) v. Goneye Mundul and Others (Defendants).*

Right of Occupancy--Lease--Abandonment.

Baboo Bhowani Churn Dutt for the appellants.

Baboo Abhai Churn Bose for the respondents.

THE judgment of the Court was delivered by

Loch, J.--We think the judgment of the lower Court must be reversed. The plaintiffs state that they obtained a lease from Jakir Gazi and Bazi Bewa, who are ryots having a right of occupancy; that they have been ousted by the defendants; and that they now seek to recover possession under the terms of their lease.

The Judge has reversed the order of the first Court, apparently on the ground that the lessors of the plaintiffs were not entitled to grant them a lease; that such a lease would be a transfer of their rights; that it has been held by a Full Bench of this Court that a right of occupancy does not make a jote transferable if otherwise not so Mussamut Emambandee Begum Vs. Ajoodhia Persad . He further held that as the former ryots, lessors of the plaintiffs, had left the land, the defendants, zamindars, were entitled to enter upon it, as ruled by a Division Bench of this Court in the case of Joy Kishen Mookerjee v. Raj Kishen Mookerjee 5 W.R., 147. We think the Full Bench Ruling quoted by the Judge is quite inapplicable to this case. That related to the sale of a tenure in which the tenant had merely acquired a right of occupancy, and the Court then held that a mere fact of occupation for twelve years would not alter the nature of that jote, and would not make transferable what was not so in its origin. But it is evident from the terms of s. 6, Act X of 1859, and from the judgments of this Court (one of which in the case of Kalee Kishore Chatterjee v. Ram Churn Shah 9 W.R., 344 has been quoted to us by the respondent) that a tenant having a right of occupancy can create a lease, and that the lessee from him is entitled to hold the lands under the terms of the lease. If therefore the zamindar, who is entitled to

receive the rents of the land from the ryots having a right of occupancy, do eject their lessees, there can be no doubt that such lessees have a right to recover possession under the terms of their lease, the zamindar being entitled to nothing but the amount of rent which the ryots who hold from him immediately have agreed to pay.

But it is said that the tenant-lessors in this case had absconded. Even supposing they had, that would not give the zamindar a right to take possession without the intervention of law. The mere fact of a man taking his house from one village and going to another, is no proof of his having absconded and given up the land, nor would such an act on his part entitle the zamindar to treat this land as if deserted, and allow him to enter into possession of it. But it is clear in this case that there was no such abandonment. In the month of Paus the lessors, after giving a lease to the plaintiffs in this case, left the village, and in the month of Falgun following, the zamindar ousted the plaintiffs, alleging that their lessors had absconded. If he thought that they had absconded and arrears of rent were due to him, he should have brought a suit for arrears of rent and so terminated the tenure of the lessors. But he has no right to enter into the land without the assistance of law.

The judgment quoted by the Judge, in the case of Joy Kishen Mookerjee v. Raj Kishen Mookerjee 5 W.R., 147 is also not applicable to this case.

On the whole we think that the judgment of the Court below must be reversed, and a decree given to the special appellant with costs of all the Courts.

(3) Before Mr. Justice Loch and Mr. Justice Mitter.

The 4th February 1869.

Gorachand Mustafi Madan Mohan Sikdar and Others (Defendants).***

Right of Occupancy--Transfer.

Baboo Khetternath Bose for the appellant.

Baboo Taraknath Butt for the respondents.

The judgment of the Court was delivered by

Mitter, J.--Two points have been raised in this special appeal; first, that a mere right of occupancy not being transferable according to law, the defendant Madan is not entitled to retain possession of the land as against the plaintiff, who has been found by the lower Court to be the proprietor of the same; secondly, that there is no evidence to support the Judge's finding that the defendants Ashgar and Bussiruddin, the predecessors of the defendant Madan, were ryots having a right of occupancy.

With reference to the first point we are of opinion that it cannot be maintained. A right of occupancy may not be transferable by law, but there is no authority to show that the mere transfer of such a right works as a forfeiture of the rights

and interests of occupant ryots themselves. Whether Madan has acquired any thing by the auction-sale in question or not, it is not necessary for us to decide, because the Judge's finding that Ashgar and Bussiruddin, who have been made defendants in this suit, are ryots having a right of occupancy, is a sufficient answer to the plaintiff's claim for khas possession. The plaintiff may or may not choose to recognize Madan as his tenant; but as long as Ashgar and Bussiruddin are alive, and as long as they have done nothing to forfeit their right of occupancy, the plaintiff cannot maintain a suit for khas possession.

The second point is also untenable. There was legal evidence of a very strong character, namely, the evidence given by the plaintiff's own witnesses, to show that Ashgar and Bussiruddin had acquired a right of occupancy in the land in question, and this Court is not competent to interfere with the Judge's finding based upon that evidence.

This appeal is accordingly rejected with costs.

(4) Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

The 14th February 1871.

Tarapersad Roy and Others (Defendants) V. Surjokanto Acharjee Chowdhry (Plaintiff).****

Right of Occupancy--Transfer--Consent of Zamindar--Act X of 1859, s. 6.

Baboos Chunder Madhub Ghose and Romesh Chunder Mitter for the appellants.

Baboos Hem Chunder Banerjee and Srinath Doss for the respondent.

The following judgments were delivered:--

E. Jackson, J.--This was a suit under cl. 6, s. 23, Act X of 1859. The plaintiff, alleging himself to be the owner of a tenure consisting of 69 bigas and odd katas in the zamindari of the defendants, stated that he had been illegally dispossessed from that tenure by the defendants on the 27th Chaitra 1274 (8th April 1863), and he therefore sought to recover possession. The defendants in their answer denied that the plaintiff had been dispossessed in Chaitra 1274, denied that he had been in possession for three years previous to that time, and urged that consequently the law of limitation barred the suit; they urged also that the suit would not lie under Act X of 1859. And the plaintiff having alleged that he held a right of occupancy in this land, the defendants contended that no such right existed in him.

Both the lower Courts have found in favor of the plaintiff on the question of limitation; they have found that he was in possession. The lower Appellate Court, concurring in the decision of the first Court, has found that the plaintiff was dispossessed in Chaitra 1274; and on the question of the right of occupancy of the plaintiff, the Appellate Court seems to be of opinion that whether he held a right of occupancy or not, still the transfer of the jote to the present plaintiff was

a legal transfer, and consequently the plaintiff was entitled to recover.

The first point taken before us in special appeal is that the lower Appellate Court has not properly decided the question of limitation. I certainly think that it would be better if the Appellate Court had given its own reasons for coming to the conclusion at which it has arrived. Looking back however to the facts found by the Deputy Collector, there seems to have been ample evidence to the effect that the plaintiff had been in possession, and that he was dispossessed on the date alleged. The first Court goes very carefully into the evidence on the point, and considers that the dispossession did take place on the date alleged. There is also the fact that a few years before the alleged dispossession, there had been an Act IV decree passed in favor of the plaintiff, and that the plaintiff had actually sought to be put in possession, and orders had been passed to put him in possession. Coupling this fact with the evidence of dispossession subsequently, it seems to me that the Courts were of opinion that the plaintiff had been in possession until he was dispossessed as alleged, and that there was ample evidence to support that finding.

The second point which has been taken before us is that even taking the plaintiff's statements as detailed in his plaint to be correct, the plaintiff cannot obtain a decree; that it is for the plaintiff, who brings a suit of this sort, to show that his tenancy was still subsisting when he was dispossessed.

The plaintiff claims his tenancy to be subsisting solely on one ground, namely, that he held a right of occupancy; he does not claim to hold under any terminable lease the term of which has not expired; he does not claim for his tenure any particular rights, his claim is that he holds a right of occupancy. It is argued before us for the defendant that this right of occupancy did not exist, and for the plaintiff that the plaintiff had made out such a right. We are not satisfied upon this point that the plaintiff has any right of occupancy. The plaintiff's allegation is that this tenure was formerly held by Mr. Lamb; that he purchased it from Mr. Lamb in the year 1267; and that he was dispossessed in the year 1274. It is admitted then that between the year 1267 and 1274, he himself could not have acquired a right of occupancy, but that right is claimed as having been obtained by transfer from Mr. Lamb. It is argued that as the zamindar consented to the transfer of the rights which Mr. Lamb possessed to the present plaintiff, the conduct of the zamindar, in allowing the sale to take place, was sufficient evidence of his consent to the transfer of the right of occupancy, as well as of the jote. We think that the right of occupancy stated in s. 6, Act X of 1859, is not a right which can be transferred except as laid down in the Act. It is a right which is attended with certain privileges which are stated in Act X of 1859; those privileges can only be acquired under the distinct circumstances stated in that Act. There is nothing to show that in the original jote, which was stated to have been held by Mr. Lamb, there were any such terms as would make the tenure a perpetual one. As far as we can see it was only a yearly holding. Even if the defendant consented to the transfer, it seems to me that the plaintiff thereby

merely acquired a new jote on the same terms as the original tenure was held. He might in time acquire a right of occupancy, but he is not entitled, to make up his right of occupancy, to add the time during which his predecessor Mr. Lamb held it.

There is one decision of this Court quoted against this view of the law,--in the case of Huro Chunder Goho v. Dunn 5 W.R., Act X Rul., 55,--and there is no doubt it is to some extent in point. There is an allusion there to some consent to the transfer having been given, but whether it was a direct consent or one presumed only from the receipt of rent, is not very clear upon the facts. In this case now before us there we no direct consent, and consent is of presumed from the receipt of rent by some shareholder of the estate. The two cases may therefore not have been analogous. There is a subsequent Full Bench decision of this Court, to be found in the case of Mussamut Emambandee Begum Vs. Ajoodhia Persad , which to some extent set aside that former decision. It may be said that that also is not directly in point. It was there contended that every tenure in which a right of occupancy was acquired became a transferable tenure, but it was held "that there is nothing in s. 6, Act X of 1859, which shows that it was the intention of the Legislature to alter the nature of a jote, and to convert a non-transferable jote into a transferable one, merely because a ryot who held it for twelve years had thereby gained a right of occupancy under Act X of 1859."

I am of opinion then that the plaintiff has not acquired in this jote by his seven years" holding, or by the transfer from Mr. Lamb, any right of occupancy; and the plaintiff's tenure must therefore he held to be a yearly tenure subsisting from year to year, and he is liable accordingly to be dispossessed at the end of each year, when his tenure is liable to be determined.

There was at one time some question whether a Court should, in trying a case under cl. 6, s. 23, Act X of 1859, go into the question as to the plaintiffs tenure being still subsisting or not But this has been set at rest by the Full Bench decision of this Court, to be found in the case of Jonardun Acharjee v. Haradun Acharjee B.L.R., Sup. Vol., 1020. It was there held that in a suit under cl. 6, s. 23, Act X of 1859, where a ryot alleged that he had been illegally ejected, it was a proper question open for determination whether the tenancy was at an end or not;--"the question is open as to whether the tenancy was at an end or not, and if at an end, the ryot must fail in his suit."

Looking then to the plaintiff's case as regards his own tenancy, it seems to us that he has altogether failed to make out his right of occupancy. He was therefore only a yearly tenant. His own statement that he was dispossessed at the end of the year is, under these circumstances, sufficient to throw him out of Court. The dispossession was on the 27th Chaitra 1274. It is true that two or three days existed beyond that up to the end of the year. But we think in fact that the dispossession was at the end of the year, and at a time when the defendant was entitled to dispossess him because his yearly tenure had ceased.

The plaintiff, therefore upon the facts stated in the plaint, and upon the facts found in this case, cannot, we think, recover his jote. The only point upon which there might be some case made out for him is if the original jote was a perpetual jote. But there is no allegation of that sort. It is only alleged here that the plaintiff has a right of occupancy, and that the jote is transferable. That it is transferable with the consent of the zamindar is undoubted, and such consent has been made out in this case, but there is no evidence, and indeed no allegation, that the original tenure of Mr. Lamb was of a perpetual nature.

We reverse the decisions of the lower Courts, and dismiss the plaintiff's suit with costs in all the Courts.

Mookerjee, J.--I concur in dismissing the suit of the plaintiff with costs.

(5) Before Mr. Justice Phear and Mr. Justice Morris.

The 20th September 1873.

Buti Singh (Plaintiff) V. Murat Singh and Others (Defendants).*****

Right of Occupancy--Abandonment-Transfer of Portion of Jote--Custom.

Mr. R.E. Twidale and Baboo Mohini Mohun Roy for the appellants.

Mr. C. Gregory and Baboo Nil Madhub Sen for the respondents.

The judgment of the Court was delivered by

Phear, J.--We think that the judgment of the Subordinate Judge is not entirely right upon the facts at which that Court arrived. Both the first Court and the lower Appellate Court were agreed in thinking that the defendants Nos. 1 and 2 had failed in proving that they had an old gora-bandi right to their jote; but the lower Appellate Court, upon the evidence which it refers to, was of opinion that these defendants had gained a right of occupancy under the rent law, and that such a right of occupancy was in their village or in their neighbourhood, recognized as a transferable right, irrespective of the will of the zamindar. It seems to us more than doubtful whether any evidence could establish that a bare right of occupancy under the Act was transferable, irrespective of the will of the zamindar. But, however this may be, we are quite clear that the evidence upon which the Subordinate Judge bases his opinion is insufficient for that purpose. All the transfers to which he refers are in terms transfers of a gorabandi right; therefore the subject which was transferred by them was something very different from the bare occupancy right to this land, which was all that the Subordinate Judge found to be the right of the first two defendants. This being so, we think that the Subordinate Judge was wrong in holding that the transfer of the land in question from the first two defendants to the defendants of the second party was valid against the zamindar.

At the same time it appears to us that the zamindar has not in this case the right to eject the second defendant. These defendants have taken a small portion only

of the jote which the first defendants held, and the first defendants are still remaining in possession of that part of their jote of which they did not affect to make a transfer to the second defendants: also they have not in any sense abandoned the part of the jote which they have transferred to the second defendants; for we were told at the hearing of this case by the learned pleader who appeared for them that they were ready to take back or reassume possession of these very lands: their responsibility to their zamindar for the rent remains as it was before the pretended transfer, and they are willing to take back the land. Under these circumstances the plaintiff has no right to eject all the defendants; he could at the most eject the defendants of the second party for the purpose of putting in the defendants of the first party, which really is no ejectment at all. He has no right himself to recover possession. We think that the proper decree will be a declaration in favor of the plaintiff that the tenure of the defendants Nos. 1 and 2 was not a gorabandi tenure transferable, irrespective of the will of the zamindar; and that the kabala which these defendants granted to the defendants of the second party is void and inoperative as regards the plaintiff. Further, we think that there should be an injunction against the defendants of the second party alone, restraining them from setting up against the plaintiff any title to this land as a jote based upon the footing of that kabala.

We therefore reverse the decision of the lower Appellate Court, and instead thereof make a declaratory order in terms which have just been mentioned. We also think that the appellant must have his costs of this appeal, and that each party should pay its own costs in the Courts below.

* Special Appeal, No. 1252 of 1871, against a decree of the Judge of Zilla Rungpore, dated the 31st May 1871, reversing a decree of the Subordinate Judge of that district, dated the 15th May 1869.

** Special Appeal, No. 2252 of 1868, against a decree of the Officiating Additional Judge of Zilla Jessore, dated the 23rd May 1868, reversing a decree of the Sudder Munsif of that district, dated the 9th April 1867.

*** Special Appeal, No. 1218 of 1868, against a decree of the Officiating Additional Judge of Zilla Jessore, dated the 15th February 1868, reversing a decree of the Munsif of Khoolya, dated the 28th February 1867.

**** Special Appeal, No. 1731 of 1870, against a decree of the Judge of Zilla Dacca, dated the 20th May 1870, affirming a decree of the Deputy Collector of Moonsheegunge, dated the 11th August 1869.

***** Special Appeal, No. 1651 of 1872, against a decree of the Subordinate Judge of Zilla Bhaugulpore, dated the 26th July 1872, reversing a decree of the Munsif of Monghyr, dated the 7th June 1872.