SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Chandra Binode Kundu Vs. Sheikh Ala Bux Dewan and on His Death One of His Heirs and Legal Representatives, Samartaban Bibi and ors.

Chandra Binode Kundu Vs. Sheikh Ala Bux Dewan and on His Death One of His Heirs and Legal Representatives, Samartaban Bibi and ors.

SooperKanoon Citation : sooperkanoon.com/856197

Court : Kolkata

Decided On : Jun-01-1920

Reported in : AIR1921Cal15,58Ind.Cas.353

Judge : Asutosh Mookerjee, C.J., ;Ernest Fletcher, ;N.R. Chatterjea, ;Richardson, ;Asutosh Chaudhuri and ;Syed Shamsul Huda, JJ.

Appellant : Chandra Binode Kundu

Respondent : Sheikh Ala Bux Dewan and on His Death One of His Heirs and Legal Representatives, Samartaban Bibi an

Judgement :

Asutosh Mookerjee, C.J.

1. This is an appeal by a decree-holder from an order made by the Court of Appeal below in affirmance of an order of dismissal passed by the primary Court on an application for execution of a decree. The applicants hold a degree for money against the respondent; and in execution of that decree they have attached his holding. It so happens that the applicants are the landlords of the respondent, who is a raiyat with right of occupancy in the attached holding. His objection is that the holding is not transferable by custom or local usage and cannot be sold in execution of the decree held by the applicant. The Courts below have given effect

to this objection and have held that a non-transferable occupancy holding cannot, if the ryot objects, be sold in execution of a decree for money, even though the decree-holder be the sole landlord of the ryot. There is no authority in this Court which explicitly affirms this proposition; but the question was raised and decided in Macpherson v. Debi Bhushan 42 Ind. Cas. 36 : 2 P.L.J. 530 where it was ruled that even a sole landlord cannot in execution of a money-decree sell his ryot's occupancy holding if the ryot objects, unless the holding is transferable by custom or local usage. This decision of the Patna High Court is not binding upon this Court as an authority. But it was argued on behalf of the judgment debtor before the Division Bench which heard the present appeal in the first instance, that the view taken in the case just mentioned is a logical deduction from the rule recognised in Narayini v. Nabin Chandra 36 Ind. Cas. 803 : 21 C.W.N. 400 : 44 C. 720 35 C.L.J. 351 as derivable from the proposition enunciated by the Full Bench in Dayamoyi v. Ananda Mohan Roy 27 Ind. Cas. 61 : 42 C. 172 : 18 C.W.N. 971 : 20 C.L.J. 52 (F.B.) which, again it was contended, substantially adopted the principle laid down in Bhiramali v. Gopi Kant 24 C. 355 : 1 C.W.N. 396 : 12 Ind. Dec. (N.S.) 904. On the other hand, it was argued before the Division Bench on behalf of the decree-holder, that a contrary view was deducible from other decisions of this Court which had never been expressly overruled, such as Ananda Das v. Ratnakar 7 C.W.N. 572 and Shukuruddin Chowdhury v. Rani Hemangini Debi 13 Ind. Cas. 192 : 16 C.W.N. 420. In view of this conflict of judicial opinion, the Division Bench has referred the following question for decision by a Full Bench:

Is the sole landlord of a ryot competent to sell, in execution of a money-decree against the ryot, his occupancy holding, unless the holding is transferable by usage or custom

2. When the case was opened before the Full Bench, it became manifest that the decision in Dayamoyi v. Ananda Mohan Roy 27 Ind. Cas. 61 : 42 C. 172 : 18 C.W.N. 971 : 20 C.L.J. 52 (F.B.) itself might require examination, as, indeed, would be plain from the following sequence of propositions:

(1) In the absence of custom or local usage to the contrary, a ryoti holding, in which the ryot has only a right of occupancy, is not saleable at the instance of the

occupancy ryot or any or editor of his other than his landlord seeking to obtain satisfaction of his decree for arrears of rent Bhiramali v. Gopi Kant 24 C. 355 : 1 C.W.N. 396 : 12 Ind. Dec. (N.S.) 904.

(2) A judgment-debtor whose occupancy holding, though not transferable by custom or local usage, is sought to be sold in contravention of the above rule, may object to the proposed sale if he is aware of the execution proceeding otherwise, if a sale takes place, he may object, even after the confirmation of the sale, when possession is delivered to the execution purchaser, Durga Charan v. Kali Prosanna 26 C. 727 : 3 C.W.N. 586 : 13 Ind. Dec. (N.S.) 1064.

(3) In transfers, for value, of occupancy holdings, apart from custom or local usage, the transfer is operative (a) as against the ryot, when it is made involuntarily and the ryot with knowledge fails or omits to have the sale set aside, and (b) as against the landlord in all case s in which it is operative against the ryot, provided the landlord has given his previous or subsequent consent. Dayamoyi v. Ananda Mohan Roy 27 Ind. Cas. 61 : 42 C. 172 : 18 C.W.N. 971 : 20 C.L.J. 52 (F.B.).

(4) An occupancy holding which is not saleable by custom or local usage cannot be sold in execution of a decree for money obtained against the ryot, when the ryot objects, even if all the landlords gave their consent to the sale. Narayani v. Nabin Chandra 36 Ind. Cas. 803 : 21 C.W.N. 400 : 44 C. 720 35 C.L.J. 351.

(5) The sole landlord of a ryot cannot, if the ryot objects, sell his occupancy holding in execution of a money decree, unless the holding is transferable by custom or local usage Macpherson v. Debi Bhushan 42 Ind. Cas. 36 : 2 P.L.J. 530.

3. It is indisputable that the appellant before us, in order to succeed, must assail the decision in Bhiramali v. Gopi Kant 24 C. 355 : 1 C.W.N. 396 : 12 Ind. Dec. (N.S.) 904 and also the Full Bench decision in Dayamoyi v. Ananda Mohan Roy 27 Ind. Cas. 61 : 42 C. 172 : 18 C.W.N. 971 : 20 C.L.J. 52 (F.B.), to the extent that it accorded approval to the substance of the principle embodied in that case. In these circumstances this Special Bench has been constituted to consider the

question referred, so that we may be free, in accordance with the rules of the Court, to examine the correctness of the Full Bench decision in Dayamoyi v. Ananda Mohan Roy 27 Ind. Cas. 61 : 42 C. 172 : 18 C.W.N. 971 : 20 C.L.J. 52 (F.B.), in so far as it affects the present matter. Consequently, as might have been anticipated the elaborate arguments addressed to us on the question of the nature and incidents of occupancy right have centered round the decision in Bhiramali v. Gopi Kant 24 C. 355 : 1 C.W.N. 396 : 12 Ind. Dec. (N.S.) 904. On the one hand, it has been maintained by the decree-holder that it departed on erroneous grounds from what was, at the time, really well settled law; it has been contended, on the other hand, that it merely gave effect to what had been the accepted view on the subject from the date of the Permanent Settlement.

4. The earliest judicial pronouncement on the subject of transferability of a ryoti holding, which we have been able to trace, ii contained in Construction No. 890, dated the 11th July 1834, issued by the Bengal Sudder Dewani Adawlut, in the case of Neelkanth Roy v. Kasheenath Ghose. The petitioner requested 'to know whether the jote jama of the latter (defendant) can be disposed of in satisfaction of a decree obtained against him for Rs. 782 under Regulation IV of 1793' (Sudder Diary, 1834, page 268). The construction was addressed to the Judge of Zillah Jessore who had forwarded the petition and is in the following terms:

1 I am directed by the Court to acknowledge the receipt of your letter of the 24th ultimo and its enclosure requesting the Court's opinion as to the liability of the jote jama of a ryot to be sold in execution of a money decree, provided the Zemindar do not object to the measure.

2. In reply, I am directed to inform you that the Court are of opinion that the rights and interests of the jotedar, may be sold in satisfaction of a decree.

5. It is important to bear in mind that this construction was not a casual expression of opinion by the Sudder Dewani Adawlut, but was a deliberate determination upon a question of law in the perform once of statutory duty imposed on the Judges. The framers of the Bengal Regulations, in their desire to secure certain by and uniformity in the administration of the law, took appropriate measures which may perhaps have been forgotten at this distance of time and may be usefully

recalled here. Regulation XLI of 1793, passed on the 1st May 1793, embodied rules for the construction of the Regulations. Regulation X of 1796, passed on the 7th October 1796, was framed for the guidance of the Courts of Justine in case s of a difference of opinion on the meaning and constriction of the Regulations. Section 2 of this Regulation authorised Zillah and City Judges and Magistrates to state objections to precepts of the Provincial Courts or Courts of Circuit, if they considered such precepts to be contrary to or unwarranted by the Regulations. If the Provincial Courts or Courts of Circuit, in reply to the objections, confirmed the first precept in whole or in part, the Zillah or City Judge or Magistrate was bound to comply with the requisition. But the Zillah or City Judge or Magistrate was at liberty to request a reference to the Sudder Dewani or Nizamut Adawlut according as the case in question related to the Civil or Criminal department. Section 3 next provided that, on such reference, the determination of the Sudder Dewani or Nizamut Adawlut was to be held final and conclusive. Section 4 then laid down that if the Sudder Court should consider that the matter was doubtful or that the Regulations did not sufficiently provide for the case submitted for their decision, the Judges should report the matter to the Governor-General in Council, so that a new Regulation might be framed in explanation of the doubt or to cover case s of that description. In performance of the important duty thus imposed on the Sudder Courts, the Judges, from time to time, issued constructions which were held final and conclusive by all subordinate Courts. The first of these constructions was issued on the 3rd May 1798, and so far as information is now available, the last (No. 1415) on the 19th July 1847. By Regulation VI of 1831, a Sudder Dewani and Nizamut Adawlut was established at Allahabad for the Western Provinces with effect from 1st January 1832, and we find it frequently noted, with regard to individual constructions issued thereafter by the Calcutta Court or by the Western Court, respectively, that the Western Court or the Calcutta Court, as the case might be, concurred in the construction. Collections of these constructions were from time to time issued under the authority of Government; the standard edition is that in three volumes published during 1833-1844; a later edition in two volumes was brought out by Mr. C.T. Buckland in 1855.

6. The circumstances under which the question raised by the Judge of Jessore same to be decided by the Sudder Court may new be briefly stated, The rules of

procedure applicable to civil suits were embodied in Regulation IV of 1793 as subsequently modified by Regulation XXVI of 1814 Section 7 of Regulation IV of 1793 prescribed the mode of execution of decrees in the following terms:

The Court is then to cause the decrees to be executed, if it be for a Zemindary, independent or dependent Taluk, or other estate or real property, by causing possession of the property to be delivered to the person to whom it may be decreed; if it be for personal property or a sum of money, by causing the specifies thing to be delivered or the value of it, or the sum of money decreed, to be levied by public sale by auction of a sufficient portion, or if requisite for the satisfaction of the decree, the whole of the lands, houses, and all the other effects, either real or personal, belonging to the party against whom the judgment may have been given, or by the attachment of his person or where it may be necessary, both by the sale of his property and effects, and the attachment of his person.

7. This provision was left unaffected by Clause 7 of Section 15 of Regulation XXVI of 1814, which provided that the Court, after sousing the purport of the petition for execution to be compared with the decree contained in the original record of the suit, should proceed to execute the same in conformity with the provisions which were then in force or which might thereafter be enacted. Consequently, under Section 7 of Regulation IV of 1793 the decree-holder might, prim a facie, in execution of a decree for money against a ryot with right of occupancy, levy the judgment debt by public sale by auction of a sufficient portion or the whole of the lands, houses and all other effects, either real or personal, belonging to the ryot. A difficulty, however, might be created by the reason of the phraseology used in Clause 7 of Section 15 of Regulation VII of 1799, which described a lease holder or other tenant as having a right of occupancy only so long as a certain rent or a rent determinable on certain principles according to local rates or usages be paid, without any right of property or transferable possession'. No doubt, Regulation VII of 1799 was framed, not with a view to define the status of tenants of various degrees, but only to provide rules so as to enable proprietors and farmers of land to realise their rants with punctuality; still the use of the expressions just mentioned might well create a doubt and suggest the question, whether a tenant having a right of occupancy was 'without a right of property or transferable

possession' absolutely or only in relation to his landlord who could treat the defaulting tenure itself as forfeited by a breach of the condition for due payment of rent, no matter who might be in actual occupation.

8. The phraseology used in Regulation VII of 1799 is similar to that employed by well-known writers of that generation on the subject of the land tenures of the Presidency of Bengal. Thus in paragraph 389, of a Minute recorded by Sir John Shore on the 13th June 1789, respecting the proposed permanent settlement of the lands in the Bengal Provinces, we find the following statement.

'It is, however, generally understood that the ryots by long occupancy acquire a right of possession in the soil and are not subject to be removed; but this does not authorise them to sell or mortgage it, and it is, so far, distinct from a right of property. This like all other rights under a despotic or varying form of Government, is precarious' (Fifth Report edited by Firminger, Volume II, page 84).

9. But there can be little doubt that, as stated by Sir John Shore himself in paragraph 15 of another Minute recorded on the 8th December 1789 'the most cursory observation shows the situation of things in the country to be singularly confused. The relation of a Zemindar to the Government and of a ryot to the Zemindar is neither that of a proprietor nor a vassal, but a compound of both; the former performs acts of authority unconnected with proprietary right; the latter has rights without real property; and the property of the one and rights of the other are in a great measure held at discretion' Sir John Harrington in his Analysis of the Bengal Regulations (Volume III, pages 419--468) deals with the rights of the under tenants and quotes largely from the Minute of Sir John Shore. There is one passage which may be usefully reproduced here from paragraphs 406 and 407 of the Minute dated 18th June 1789 (Fifth Report, Volume II, page 87):

406. Pattas to the khudkasht ryot, or these who cultivate the land of the village where they reside, are generally giver, without any limitation of period; and express that they are to hold the lands, paying the rents from year to year. Hence the right of occupancy originates and it is equally understood as a prescriptive law, that the ryots who hold by this tenure, cannot relinquish any part of the lards in their possession, or change the species of cultivation, without a forfeiture of the

right of occupancy which is rarely insisted upon; and the Zemindars demand and. exact the difference. I under-stand also that this right of occupancy is admitted to extend, even to the heirs of those who enjoy it.

407. Pykaust ryots, or those who cultivate the lard of villages where they do not reside, hold their lands upon a more indefinite tenure. The Pattas to them are generally granted with a limitation in point of time: where they deem the terms unfavorable, they repair to some other spot.

10. It is plain that a distinction was made between ryots who cultivated the lands of the village where they resided and ryots who cultivated the lands of villages where they did rot reside; the former alone apparently had a right of occupancy. Whether in those early days, a question ever arose as to the transfer-ability of the tenancy of a resident cultivator, except as between the ryot and his landlord, it is impossible at this distance of time to investigate. No records are known to have been preserved of the proceedings of such Courts as existed before the re establishment of the Sudder Devrani Adawlut in 1793, and the earliest judicial pronouncement on the subject which has been traced is contained in the construction dated the 11th July 1834. The Court at the time consisted of five Judges, Rattray, C.J., Shakespear, Braddon, Robertson and Smyth, JJ., some of whom had been members of the Court for several years and all of whom had considerable experience of judicial administration as covenanted servants of the East India Company. A pronouncement by a Court so composed must obviously carry great weight as to what was understood to be the law at that time.

11. On behalf of the respondent, it was argued that the construction was intended to lay down a rule applicable only to case s where the jote jama of the ryot was transferable by custom. There is no force in this contention, for the manifest reason that it would be wholly superfluous to lay down a rule that a transferable jote jama could be sold in execution provided the Zemindar did not object. The scope and effect of the construction are, however, placed beyond all doubt by a Minute which was recorded by Rattray, C.J., Tucker, Reid and Dick, JJ., on the 5th December 1845 on a reference by the Sudder Dewani Adawlut of the North Western Provinces. The Court stated that 'the phrase rights and interests was

purposely employed, convening that the rights and interests of a jotedar could be sold without determining of what they consisted, a question which could be properly disposed of only by regular suit in the Civil Courts." The Court thus left any case in which the question might arise to depend upon the evidence adduced in support of either the assertion or the denial of the existence of such saleable rights and interests. The Court was, as. might be anticipated, fully aware that only certain tenancies were transferable, for they preceded to add: it is acknowledged by the Court that there are in certain districts of Bengal, and more particularly in Jessore, Faridpur and Rungpore, Joee jamas, the proprietors of which have a transferable right in the soil, subject to the payment of rent to the Zamindar, These tenures are saleable- for arrears, and any surplus sale proceeds--which may remain after satisfying the Zemindar's demand, are paid to the late jotedar. The jama of such a tenure is fixed or variable according to its date being antecedent or subsequent to the Decennial Settlement. These and other points require to be determined in each once, and it cannot be said, therefore, that the employment of the term jotedar implies any specific rights and interests.' It will be observed that Rattray, C.J., was a party to the construction of the 11th July 1834 as also to the explanatory memorandum of the 5th December 1845, There can, in our opinion, be no room far doubt that the construction was intended to apply to all tenancies', transferable or non-transferable. We may add that the construction which was adopted by the Western Court on the 5th September 1834 was repealed in the North-Western Provinces (Taylor, Thompson and Davidson, JJ.) on the 1st January 1846; but it continued to be in full operation within the jurisdiction of the Bengal Sudder Dewani Adawlut.

12. This construction was treated as good law in the case of Baboo Prosonokoomar Tagore v. Rammohun Doss (1855) Bengal S.D.A.R. 14 at p. 15 : 14 Ind. Dec (O.S.) 11 decided by a Full Bench of the Sadder Dewani Adawlut (Sir R. Barlow, C.J., Raikes and Colvin, JJ.) on the 11th January 1855. In that case, the transferee of a ryot sued to recover possession of a jote from the landlord. The landlord contended that such sale without his permission was not good. The primary Court overruled the objection and decree d the suit. The lower Appellate Court confirmed this decree. On Second appeal to the Sudder Court, the question was raised, whether a ryot could sell his jote to a third party without permission of

the Zemindar. On behalf of the transferee of the jote reliance was placed upon construction No. 890. The Court observed that the case before them was that of a private purchaser, while the construction related to the case of a purchaser at an execution sale, and then pointed out that the construction provides that the permission of the Zemindar to the Bale of the jote in execution of decree must be obtained. The Court accordingly held that the plaintiff's claim to possession without permission of the Zemindar was invalid, and added:

He bought as he thought something; the principle caveat emptor strictly applies and it was for him to look to the certainty of getting a consideration for his purchase money. The party whom he succeeded had no equivalent to offer; he had merely a right of occupancy so long as he paid his rents; failing to do so, either from inability or from unwillingness, the possession returned to the proprietor, the contract between him and his ryot being no longer in force. Such is the custom of the country and none but the tenures referred to in Act I of 1845 (Revenue Sale Law, Section 26) or in case s where a bonus has been given, thereby creating in the ryot a right in the property to that extent, are considered tenures transferable by the ryot. In support of this opinion, reference may be had to that of Harrington; see pages 434 and 450 of his Analysis, Volume III.

13. The combined effect of the construction in the case of Neelkanth Roy v. Kasheenath Ghose and of the decision in Baboo Prosonokoomar Tagore v. Rammohun Doss (1855) Bengal S.D.A.R. 14 at p. 15 : 14 Ind. Dec (O.S.) 11 thus was that the jote jama of a ryot could be said in execution of a money decree provided the Zemindar did not object to the measure, and a private alienation thereof by the ryot was invalid against the Zemindar if made without his permission. Such was the law as understood and administered by the Sadder Dewani Adawlut when Act X of 1859 was placed on the Statute book; the restraint on the ryot against the alienation of his land, whether voluntary or involuntary, was deemed to be for the benefit of his landlord, and the fetter might be removed by the assent of the landlord. The theory that such restraint might be imposed for the benefit of the ryot himself, to protest him against his own improvidence, had not yet been propounded.

14. Before we proceed to consider the law as administered under Act X of 1859, reference may be made to a curious case, Thakoee Sarap v. Smoult (1843) Fulton 136 : 1 Ind. Dec. (O.S.) 726, which was decided by the Supreme Court in 1843. That was action of trespass, vi et armis, brought against the Sheriff of Calcutta for wrongful execution with regard to properties in the District of Dacca. The property was in the actual occupation of the ryots, while the Act ion was instituted by the Talukdar. The Counsel for the defendant argued that the Talukdars were not owners of the land, but were mere Government collectors who framed the revenues of the Taluk, making the most of them from the ryot and paying a fixed income to the Government. The Counsel for the plaintiff argued that the Talukdar was the party in immediate possession of the land, that the ryot had no interest therein but was a mere cultivator of the soil; but Counsel also added that the ryot had an hereditary interest independent of both Talukdar and Government, neither of whom could displace him so long as he paid his rent. Sir Lawrence Peel, C.J., with the concurrence of Sir John Grant and Sir Henry Seton, JJ., non suited the plaintiff and observed: 'the ryot here has a better tenure than a lessee in England and one not nearly so precarious as that of the tenant at will. Case was the proper remedy in this instance, for though the Zamindar has no reversionary interest he has an interest which has been injured by the tortuous ant of the defendant.' There was manifestly mush uncertainty as to the true status of the ryot and his relation to the Zemindar in those days, and the object of the Legislature was to remove these doubts, as far as practicable, by the provisions of a new and comprehensive measure.

15. In the Bill which subsequently became Act X of 1859, an attempt was made, for the first time, by the Legislature to define the right of occupancy enjoyed by a ryot. It was recited in the statement of objects and reasons, dated the 10th October 1857, that the Regulation recognised the right of all resident ryots to the occupancy of the lands cultivated by them so long as they paid the established rent. The Bill consequently contained a declaration that all resident ryots or cultivators had a right of occupancy in the lands held or cultivated by them so long as they paid the rents legally demandable from them. Clause 4 of the Bill was framed in the following terms:

Every resident Raiyat and cultivator has a right of occupancy in the land held or cultivated by him, whether it be held under Patta or not, so long as he pays the rent payable on account of the tarns: but this rule does not apply to khamar, neej jote or sesr land belonging to the proprietor of the estate or tenure and leased for a term or year by year to a resident cultivator, nor (as respects the actual cultivator) to lands sublet to a resident cultivator by a ryot having a right of occupancy.

16. When, however, the Bill was passed into law, this provision had become materially altered and had been transformed into what is familiar to us as Section 6 of Act X of 1859:

Every Raiyat, who has cultivated or held land for a period of 12 years, has a right of occupancy in the land so cultivated or held by him, whether it be held under Patta or not, so long as he pays the rent payable on account of the same; but this rule does not apply to khamar, neej jote, seer land belonging to the proprietor of the estate or tenure and let by him on 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 Raiyat having a right of occupancy. The holding of the father or other person from whom a Raiyat inherits shall be deemed to be the holding of the ryot within the meaning of this section.

17. It is plain on a comparison of the clause in the Bill as introduced with the section as finally enacted that the two differ on fundamental points, namely, first, the right of occupancy was recognised as attainable by all ryots including non-resident ryots; secondly, such right could be acquired by continuous cultivation for a period of twelve year; thirdly, the right, while in process of growth, was transmissible by inheritance; and fourthly, there was no distinction made between resident and non-resident cultivators in respect of the private lands of the proprietor. Whether the clause in its original form or the section in its final shape represented the pre existing law on the subject has been matter of controversy, and there has been a marked divergence of judicial opinion on the subject as will appear from an examination of the judgment of Sir Barnes Peacock, C.J., in Hills v. Ishore Ghose Marsh. 151 : W.R.F.B 48 : 1 Ind. Ind. Jur. (O.S.) 25 : 1 Hay. 350; Hills v. Ishore Ghose W.R.F.B 131 and Ishore Ghose v. Hills W.R.F.B. 148 and the

judgments of Mr. justice Trevor in Thckoorance Dossee v. Bisheshur B.L.R. Sup Vol. 202 : 3 W.R. Act X Rul. 29 which was heard by the Full Court and overruled the decision in Hills v. Ishore Ghose W.R.F.B. 148. We are not now concerned with the question which was considered by the Full Court, namely, the liability to enhancement of the rent of an occupancy ryot. But the remarkable fact remains that although the question of the status of an occupancy ryot was considered by the Legislature in 1859, no attempt was made to give an exhaustive enumeration of the incidents of the tenancy and nothing was stated about transferability or even about habitability. The papers relating to the passing of Act X of 1859 as also those relating to the working of the Act were published by the Government of India in 1833. Amongst the numerous opinions recorded at the time by judicial and administrative officers as also by the Chief justice and Judges of this Court, no trace can be found of a discussion of the question of transferability, though there are casual suggestions for the 'compulsory enfranchisement of the restricted tenure of occupancy ryots' by payment of a prescribed fee to the Zemindar. When we turn to the judicial decisions, we find an almost equal paucity of authorities on the question of the transferability of occupancy holdings. As will presently be seen, when ever the question was raised, the validity of the transfer was challenged by the landlord or by a person claiming as his representative, Tie rule enunciated by the Sudder Court as to involuntary alienations in 1834 and as to voluntary alienations in 1855 does hot appear to have been controverter in any reported decision. This is not a matter for surprise. Act X of 1859 made the status of an occupancy ryot more certain and less precarious than it was under the Regulations. Further protection was accorded to the ryot against various means of oppression to which Zemindars were accustomed to have recourse under Regulation VII of 1799, and although the ryot still continued liable to forfeit his Tenancy for non-payment of rent, he could not be ejected otherwise than in execution of a decree or order under the provisions of the Act (section 21) It is not necessary for our present purpose to attempt a complete enumeration of all the advantages conferred on the ryot by the Legislation of 1859; it is sufficient to state that the marked improvement in the status of the ryot steadily tended to weaken the theory, if it ever prevailed, that the right of occupancy was a purely personal right.

18. Amongst judicial decisions pronounced during the operation of Act X of 1859 or Act VIII of 1869 B.C. (which transferred the jurisdiction to determine disputes between landlords and tenants from the Revenue Courts to the Civil Courts), the most important are two Full Bench cases, namely Ajoodhya Pershad v. Imam Bandi Begum 7 W.R. 528 : B.L.R. Sup. Vol. 725; Nurendro Narain Roy v. Ishan Chunder Sen 22 W.R. 22 : 13 B.L.R. 274. In the first case Ajoodhya Pershad v. Imam Bandi Begum 7 W.R. 528 : B.L.R. Sup. Vol. 725 the occupancy ryot transferred his holding without the consent of his landlord. The landlord sued the ryot for arrears of enhanced rent after service of the prescribed notice. The transferee intervened. The District Judge decree d the claim against the original tenant. The tenant appealed and contended, on the authority of the decision in Taramonee Dassee v. Birretsur 1 W.R. 86 that he had divested himself of all liability for rent by the transfer of his holding. The Division Bench referred the following point for the decision of a Full Bench: 'Whether a tenure, not originally transferable without the consent of the landlord, become so, because the tenant had obtained a prescriptive right of occupancy.' The Full Bench answered the question in the negative. Sir Barnes Peacock, C.J., held there was nothing in Section 6 of Act X of 1859 which showed 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. Sir Barnes Peacock also added an expression of his doubt, whether a right of occupancy actually gained under Section 6 was necessarily heritable. This doubt, as we know, has not been shared by later Judges. In the Second case Hurendro Narain Roy v. Ishan Chunder Sen 22 W.R. 22 : 13 B.L.R. 274, the suit was instituted by a purchaser of a Zamindari at a sale for arrears of Government revenue. The purchaser sought to eject the defendant who claimed to be a transferee of an occupancy holding. The question arose, whether the defendant had a protected interest as a ryot having a right of occupancy' within the meaning of the proviso to Section 37 of Act XI of 1859. His purchase of the occupancy holding on the 5th December 1859 had been recognised by the then Zamindar who had accepted him as his tenant. On behalf of the plaintiff, who had purchased the Zamindari on the 6th May 1871, it was argued that as the defendant had not himself been in occupation for twelve years

from the 5th December 1859 to the 6th May 1871, he Bad not acquired the status of an occupancy ryot under Section 6 of Act X of 1859. The question thus arose, whether the possession of the transferee could be added to the possession of the transferor who at the date of the transfer had acquired a right of occupancy. Sir Richard Couch, C.J., held that the answer to the question depended solely on the terms of Section 6 of Act VIII of 1869 B.C., which had replaced Section 6 of Act X of 1859. On the construction of that section it was ruled that, the right of occupancy can be enjoyed only by the person who holds or cultivates and pays rent and has done so for a period of twelve years; in other words, the section secures 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. In support of this construction reliance was placed upon the proviso at the end of the section by which the holding of the person from whom the ryot inherits is deemed the holding of the ryot, indicating that except in that particular case, the holding must be entirely by the person who claims the right. We are not unmindful that there are expressions in the judgment of Sir Richard Couch, C.J., to the effect that a ryot having a right of occupancy has a 'right, not being one which can be transferred to some other person', ''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,' and not 'a right which he might, having acquired it, transfer or make use of as a subject of property.' But the generality of these expressions would be misleading, if we overlooked that they were used in a case where the question of transferability was raised by the Zamindar. This circumstance, indeed, is emphasised by Sir Richard Couch when he speaks of the Bengal Rent Act as 'a law which imposes a restriction upon the proprietary right of the Zamindar or landlord' and adds that 'a ryot cannot claim under it (that is, claim against his landlord) anything more than the words clearly give to him; there are not here, in my opinion, words of so doubtful a moaning that we should consider whether it would be just or equitable that the ryot should have the power to transfer.'' Similar observations apply to the judgment of Mr. justice Phear, who thought that the right of occupancy was rather of the nature of a personal privilege than a substantive proprietary right; but this statement must be taken with what immediately follows:

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 himself 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 subject of suit, because he had 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 ha 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 Section 6 to add any years of Krishna Das's holding to the years of his own holding.

19. The scope of this decision and of the grounds therefor, as we shall see later, has been sometimes misunderstood. This has been due perhaps in some measure to the very broad general statement which forms the head note to the report in the Weekly Reporter: 'a right of occupancy which a ryot has under Act VIII B.C. of 1869, Section 6, is not transferable. When such ryot sells his holding his right of occupancy ceases, and it cannot protest the purchaser against ejectment' It is not necessary for us to examine in detail the earlier decisions which are mentioned in the order of reference to the Full Bench by Mark by and Birch, JJ. But reference must be made to the judgment of Mr. Justice Phear in Bibee Suhodra v. Maxwell Smith 20 W.R. 139 at p. 141 : 12 B.L.R. 82 where a comparison is instituted between a right of occupancy and a profit a prendre, and

the royt's interest is described as the dominant right and the Zemindar's the servant right. Analogies of this description are not likely to be of mush assistance in the solution of a problem which by itself is not wholly free from complexity and confusion. Upon an examination of the facts of all the decisions on the question of transferability of occupancy holdings which preceded the decision of the Full Bench and which have been brought to our notice, we find that the validity of the transfer has been challenged only by the Zemindar or by a person claiming through or under him; and this important circumstance must be carefully borne in mind when we meet with general expressions like 'a right of occupancy cannot be transferred' in case s between landlords and tenants; as an instance, we may mention the judgment of the Judicial Committee delivered by Sir Richard Couch in the case of Chandrabati v. Harrington 18 C. 349 at p. 353 : 18 I.A. 27 : 15 Ind. Jur. 153 : 5 Sar. P.C.J. 681 : 9 Ind. Dec. (N.S.) 233; see also the judgment of Phear, J., in Bootee Singh v. Moorut Singh 20 W.R. 478 : B.L.R. 284 note. Our attention has not been drawn to a single instance where, under Act X of 1859 or Act VIII of 1869, B. C, the contention was advanced on behalf of the ryot that his holding was not transferable even with the assent of the landlord. What was understood to be the law in this respect as administered by the Sudden Dewani Adawlut before Act X of 1859 was apparently also taken to be the law under Act X of 1859 and under Act VIII of 1869 B. C, This is shown by the following extract from the judgment of Prinsep and Ghose, JJ., in Palakdhari Bai v. Manners 23 C. 179 : 12 Ind. Dec. (N.S.) 119. delivered on the 3rd September 1895:

It is useful that we should state shortly the law relating to the transfer of rights of occupancy. These rights were first expressly declared by Act X of 1853 for, although up to that time tenant right had no doubt been recognised by the Courts,, still it was not clearly defined or indeed held to exist in the terms expressed by Act X of 1359. The only person concerned in the transfer of a tenant's holding was naturally the landlord Zemindar, and if his consent had been obtained, or if he acquiesced in the transfer the transaction came into effect. But his consent was often withheld or not even asked for, and the Courts were soon called upon to determine the validity of such transfers. As a rule, the consent of the landlord was necessary. It was even doubted, see per Peacock, C.J., in Ajbodhya Perthad v. Imam Bandi Begum 7 W.R. 528 : B.L.R. Sup. Vol. 725, whether a holding with

lights of occupancy was heritable. But it was afterwards held that the consent of the landlord was not necessary to render a transfer valid if it was in accordance with a custom of the country or the locality. It will be observed, however, that in none of the case s on this subject was any reference made to a transfer in accordance with usage. The Courts held that the custom of the country or the locality alone conferred the right of transfer of such holdings without the consent of the landlord. Sales of such holdings in execution of decree s against such tenants used occasionally to be held. When they were held at the instance of the landlord as decree-holder, the transfer so effected would be with his consent; but when the sales were in execution of decrees by third parties, the right of transfer without such consent was generally disputed. Bengal Act VIII of 1869, which repealed Act X of 1859 wherever it was brought into operation, did not alter the law in this respect, except in so far that Section 6 seemed to recognise a transfer by inheritance of a holding with right of occupancy, and so the law remained until the passing of the Bengal Tenancy Act in 1885.

20. Such then was understood to be the law before the Bengal Tenancy Act came into operation, and for nearly a dozen years, no one appears to have doubted that in the event of a transfer, voluntary or involuntary, of an occupancy holding not transferable by custom or local usage, the landlord was the only person entitled to dispute the validity of the transfer, if it had been effected without his consent previously taken or assent subsequently obtained. In the case of Bhiramali v. Gopi Kant 24 C. 355 : 1 C.W.N. 396 : 12 Ind. Dec. (N.S.) 904 which was decided on the 14th January 1897, it was, however, contended by an occupancy ryot, whose holding had been sold in execution of a decree for money, that the sale was invalid and had not operated to pass any title to the purchaser at the execution sale. This contention prevailed and the proposition was enunciated for the first time that, in the absence of custom or local usage to the contrary, a ryoti holding in which the ryot has only a right of occupancy is not saleable at the instance of the occupancy ryot or any creditor of his, other than his landlord seeking to obtain satisfaction of his decree for arrears of rent. The Court came to the conclusion that ordinarily the only persons interested in impugning the validity of the transfer of an occupancy holding were the occupancy ryot and the landlord, and that though no difficulty could, arise in the way of the transfer being given effect to, where, in the event of a

voluntary alienation by the ryot, the transferee was accepted by the landlord, the position was wholly different where the transfer had been effected by a compulsory sale at the instance of a creditor of the ryot. This view was supported on three grounds, namely, first, that Section 21 of the Bengal Tenancy Act by implication indicates that the Legislature did not intend to make occupancy rights transferable ; Secondly, that Section 65 also by implication indicates that an occupancy holding could be sold, only by the entire body of landlords in execution of a degree for arrears of rent s and, thirdly, that under the law as it stood before the Bengal Tenancy Act a right of occupancy could not be transferred by sale. With all respect for the learned Judges who decided the case of Bhiramali v. Gopi Kant 24 C. 355 : 1 C.W.N. 396 : 12 Ind. Dec. (N.S.) 904, we are constrained to hold that none of these grounds is conclusive. In the first place, the Bengal Tenancy Act, as its preamble shows, is intended to amend and consolidate, not the entire law of landlord and tenant but only crtainenactments relating to that law, so that, as pointed out in Kripa Sindhu v Annada Sundari Debi 35 C. 34 : 6 C.L.J. 273 : 11 C.W.N. 983, it is not a complete Code. It nowhere purports to give an exhaustive enumeration of all the incidents of occupancy right. The fact that Section 26 makes occupancy right heritable and does not refer to the question of transferability does not consequently justify the inference that the Legislature did not intend to make occupancy right transferable. If speculation were permissible, it might, with some plausibility, be suggested that the Legislature expressly dealt with the question of habitability, as a doubt had been expressed on the point by Sir Barnes Peacock, C.J., in Ajoodhya Pershad v. Imam Bandi Begam 7 W.R. 528 : B.L.R. Sup. Vol. 725, and did not think it equally necessary to deal with the question of transferability, as the rulings of the Sudder Dewani Adawlut in 1834 and 1855 had apparently never been called in question. On the other hand, it might also be suggested with equal, if not greater, plausibility that the Legislature dealt with the simpler question of habitability and left alone the more complex problem of transferability. But whatever may be the true reason for the omission, the mere fact of the omission does not with certainly point to the conclusion that the Legislature intended to make occupancy holdings non-transferable. In the second place, Section 65 of the Bengal Tenancy Act is of no real assistance in the solution of the question before us. Section 65 enacts that where a tenant is a

permanent tenure-holder, a ryot holding at fixed rate or an occupancy ryot, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof and the rent shall be a first charge thereon. The object of this provision war, not to impose a restriction on a rule of the holding by the ryot or at the instance of his execution creditor, but to remove what had been a great hardship on the ryot for nearly a century. The framers of Regulation YI1 of 1799, in their anxiety to strengthen the hands of the Zemindar, had armed him with authority to realise arrears of rent from tenants by drastic measures which have been deemed characteristic of a semi civilised age. Amongst these remedies were distrait, arrest forfeiture, powers which could all be exercised in a summary manner. The result was that a valuable holding could be treated as forfeited and the tenant summarily ejected for non-payment, it may be, of a small sum due as arrear of rent. The severity of such methods as these was softened by some of the provisions of Act X of 1359; but it was not till 1885, that the Bengal Tenancy Act provided that an occupancy ryot was not liable to be ejected for non payment of rent. The landlord could bring the holding to sale, with the result that he would thereby realise the arrears from the sale- proceeds while the surplus would be available to the defaulter. Section 65 consequently does not justify the conclusion that an occupancy holding is saleable, only when the landlord seeks to sell it in execution of a decree for arrears of rent thereof. On the other hand, Section 65 makes the rent a first charge on the occupancy holding; for this purpose, it is placed in the same category as a permanent tenure and the holding of a ryot at fixed rates which, under Section 18, is governed by the same rules of transfer and succession as a permanent tenure. This plainly militates against the theory that an occupancy right is a purely 'personal right' or ''personal privilege.' In the third place, the statement of the law as it stood before the Bengal Tenancy Act is open to valid criticism. The inference drawn from the decision of the Full Bench in Nurendro Narain Roy v. Ishan Chunder Sen 22 W.R. 22 : 13 B.L.R. 274 is really not justified, as we have seen, by the circumstances of that case. That case arose between a Zemindar and a person who claimed protection from ejectment as the holder of an occupancy right; besides, as Sir Richard Couch, G. J., stated explicitly in his judgment and explained again in Kripa Nath v. Dyal Chand 22 W.R. 169 the case depended solely on the construction of Section

6 of Bengal Act VIII of 1839. The difficulty created by the phraseology of that section,, as will presently appear, has been removed by the altered provisions of the Bengal Tenancy Act. On the other hand, the attention of the learned Judges does not appear to have been drawn to the rule enunciated by the Sudder Dewani Adawlut in 1834 with regard to involuntary transfers and in 1855 with regard to voluntary alienations--rules which do not appear to have been ever afterwards called in question. Consequently, there is no escape from the conclusion that the grounds of the decision in Bhiramali v. Gopi Kant 24 C. 355 : 1 C.W.N. 396 : 12 Ind. Dec. (N.S.) 904, which was in reality a departure from the law as administered for over sixty year, do not stand the test of criticism.

21. In this connection, it is of fundamental importance to observe that the Bengal Tenancy Act went much further than Act X of 1859 in the way of improvement of the states of the occupancy ryot, and the phraseology used in some of its provisions can hardly be reconciled with the theory that a right of occupancy is a purely personal right. But before we deal with this point, we may explain how the Bengal Tenancy Act has removed the difficulty created by the language of Section 6 of Act X of 1859 by the introduction of the notion of 'a settled ryot of a village.' The status of a settled ryot is thus defined in Section 20:

(1) Every person who, for a period of twelve years, whether wholly or partly before or after the commencement of this 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.

(2) A person shall be deemed for the purposes of this section to have continuously held land in a village notwithstanding that the particular land held by him has been different at different times.

(3) A person shall be deemed for the purposes of this Section to have held as a raiyat any land held as a raiyat by a person whose heir he is.

(4) Land held by two or more co-sharers as a raiyaat holding shall deemed for the purposes of this section to have been held as a raiyat by each such co-sharer.

(5) A person shall continue to be a settled raiyat of a village as long as he holds any land as a raiyat in that village and for one year thereafter.

(6) If a raiyat recovers possession of land under Section 87, he shall be deemed to have continued to be a settled raiyat, notwithstanding his having been out of possession more than a year.

(7) If, in any proceeding under this Act, it is proved or admitted that a person holds any land as a raiyat, it shall, as between him and the landlord under whom he holds the land, be presumed, for the purposes of this section, until the contrary is proved or admitted, that he has for twelve years continuously held that land or some part of it as a raiyat.

22. Section 21, Sub-section 1, then provides that every person who is a settled ryot of a village within the meaning of Section 20 shall have a right of occupancy in all land for the time being held by him as a ryot in that village. Consequently, a settled ryot may acquire a right of occupancy by occupation for a shorter period than twelve years, and, further, though every settled ryot is an occupancy ryot, every occupancy ryot is not necessarily a settled ryot; for, as was pointed out in Kuldip Singh v. Chhatur Singh 3 C.L.J. 285, an occupancy right may be acquired by purchase, but the rights of a settled ryot can only be acquired by a continuous holding of land (not necessarily the same parcel of land) in the village for twelve years. It is manifest that the difficulty which was created by the language of Section 6 of Act X of 1859 need not arise under the provisions of the Bengal Tenancy Act.

23. Section 23 of the Bengal Tenancy Act authorises an-occupancy ryot to use his land in any manner which does not materially impair the value of the land or render it unfit for the purposes of the tenancy; the section further entitles him to out down trees, provided there is no local custom to the contrary. Sections 24 and 27 read together place the occupancy ryot in a position of distinct advantage so far as enhancement of rent is concerned; he is bound to pay rent only at fair and equitable rates, and, until the contrary is proved by the landlord, the rent actually paid must be deemed fair and equitable Section 28 makes the rent enhanceable only as provided in the Act ; Section 29 invalidates agreements for enhancement

beyond a prescribed limit, while Sections 30 to 37 provide definite roles and restrictions when enhancement is claimed by suit, Section 25 affords protection from eviction, and this must be taken with Section 89 which prohibits ejectment except in execution of a decree and Section 155 which affords relief against forfeitures. Section 26 deals with the question of devolution of occupancy right on the death of the ryot and provides as follows:

If a raiyat dies interstate in respect of a right of occupancy, it shall, subject to any custom to the contrary, descend in the same manner as other immoveable property; provided that in any case in which under the law of inheritances to which the raiyat is subject, his other property goes to the Grown, his right of occupancy shall be extinguished.

24. The right of occupancy, it will be observed, is, for the purpose of descent, thus placed on the same footing as 'other immoveable property.' This is hardly consistent with the theory that the right of occupancy is a merely personal right. This is further emphasised by the fact that the right of escheat is expressly negatived Section 85 authorises subletting subject to specified restrictions, and Section 87 allows the ryot to surrender his holding. Sections 76 and 77 entitle the ryot to effect substantial improvements including the construction of wells and tanks and the erection of a suitable dwelling house for himself and his family. Section 05, as already explained, protects the occupancy ryot from ejectment for non-payment of rent, makes the rent a first charge on the holding and entitles the landlord to bring it to Bale in execution of a decree for arrears of rent thereof. Section 160 treats a right of occupancy as a protected interest, not liable to be annulled by a purchaser of the superior tenure at a sale in execution of a decree for arrears of rent. The cumulative effect of these and other provisions, which need not be enumerated in detail, is to furnish abundant indication that whatever might have been the law earlier, the occupancy ryot enjoys under the Bengal Tenancy Act substantial rights in the land and his interest cannot be appropriately desorbed as a merely 'personal light' or ' personal privilege.' The position then is that the status of the occupancy ryot is far more certain and secure under the Bengal Tenancy Act than it was ever before, and there is no good reason to hold that the provisions of the Act entitle him to object to the sale of the holding in was not

competent to raise such object ion when Act X of 1859 was in force or at an earlier period. Reference may in this connection be made to illustration (1) to Section 183, which mentions a usage whereby a ryot is entitled to cell his holding without the consent of his landlord and affirms the validity of such usage as unaffected by the that the landlord is the only person interested to question the validity of a transfer of his holding by a ryot; but it does not also lend any support to the theory that the tenant is competent to object to an execution sale of his holding even though his landlord should assent thereto. On these grounds we are of opinion that the decision in Bhirarn Ali v. Gopi Kant 24 C. 355 : 1 C.W.N. 396 : 12 Ind. Dec. (N.S.) 904 cannot be supported.

25. In this view, it is not necessary to examine in detail the subsequent decisions of this Court which have followed and developed in a modified form the rule enunciated in Bhiramali v. Gopi Kant 24 C. 355 : 1 C.W.N. 396 : 12 Ind. Dec. (N.S.) 904, such as the case s of Durga Charan v. Ali Prasanna 26 C. 727 : 3 C.W.N. 586 : 13 Ind. Dec. (N.S.) 1064, Sadagar V. Krishna Chandra Nath 26 C. 937 : 3 C.W.N. 742 : 13 Ind. Dec. (N.S.) 1199; Majed Hossein v. Baghubar Chowdhry (.33); Gahar Khalifa v. Kasimuddi 27 C. 415 : 4 C.W.N. 557 : 14 Ind. Dec. (N.S.) 274; Sita Nath v. Aimaram 4 C.W.N. 571; Skeikh Murullah v. Sheikh Burullah 9 C.W.N. 972; Khodu Bakhsh v. Sader Pramanik 10 Ind. Cas. 417 : 14 C.L.J. 620, which specified the circumstances under which the ryot could impeach the validity of an execution sale even after it has taken place. We may note, however, that the current did not always flow in the same direction, as is indicated by the cases of Ananda Das v. Ratnakar 7 C.W.N. 572; Shuhuruddin Chowdhury v. Rani Hemangini Debi 13 Ind. Cas. 192 : 16 C.W.N. 420 and possibly also Dwarkanoth v. Tarini Sankar 34 C. 199 : 5 C.L.J. 294 : 11 C.W.N. 513. These cases uphold the doctrine that in principle there is no difference between the case of a voluntary sale made by the ryot and an involuntary sale held by the Court, if in each instance the tale is consented to by the landlord; consequently, a sale, in execution of a money decree, of an occupancy holding transferable by custom or local usage, is valid and effectual as against the ryot if the sale is held with the consent of the landlord.

26. We have finally to consider the decision of the Full Bench in Dayamoyi v. Ananda Mohan Roy 27 Ind. Cas. 61 : 42 C. 172 : 18 C.W.N. 971 : 20 C.L.J. 52 (F.B.), It is not necessary to examine whether the Full Bench formulated any propositions not required for the decision of the actual questions involved in the case s then before the Court. An investigation of that point might have been necessary, if we had been bound by the' decision of the Full Bench. We observe that the question of involuntary alienation was raised by the third reference; the point, however, if immaterial, because we as a Special Bench are free to consider the decision on its merits, and we shall do so on the assumption that all the propositions formulated were needed for the decision of the case s before the Full Bench. It will be observed that no reasons are assigned in support of the decision and the propositions enunciated represent the weight of modern authority alone. There is no indication that the attention of the Court was invited to the law, as it was understood and administered from the days of the Sudder Dewani Adawlut. No reference wan made to the Construction of 1834, and although the decision in Baboo Prosonokoomar Tagore v. Rammohun Doss (1855) Bengal S.D.A.R. 14 at p. 15 : 14 Ind. Dec (O.S.) 11 was casually mentioned in argument, its true bearing does not appear to have been explained to the Court, Nor was the attention of the Court invited to the decision in Dwarka Nath Misser v. Hurrish Chunder 4 C. 925 : 4 C.L.R. 130 : 2 Ind. Dec. (N.S.) 585, which affirms that there is, in principle, no ground for distinguishing in this class of eases a voluntary sale from a sale in execution. It teems as if the decision in Bhiramali v. Gopi Kant 24 C. 355 : 1 C.W.N. 396 : 12 Ind. Dec. (N.S.) 904 was not subjected to a searching analysis and was adopted by the Full Bench without question. In these circumstances, we are unable to accept the decision of the Full Bench in Dayamoyi v. Ananda Mohan Roy 27 Ind. Cas. 61 : 42 C. 172 : 18 C.W.N. 971 : 20 C.L.J. 52 (F.B.), in so far as it adopted the rule laid down in Bhiramali v. Gopi Kant 24 C. 355 : 1 C.W.N. 396 : 12 Ind. Dec. (N.S.) 904 as developed with modifications in the later case s just mentioned. No useful purpose would be served by an examination of the case s subsequent to the decision of the Full Bench, which have, as required by the rules of Court, applied the propositions enunciated therein. Amongst such case s may be mentioned Badrannessa Choudh-rani v. Alam Gazi 29 Ind. Cas. 877 : 19 C.W.N. 814 : 21 C.L.J. 650; Narayani v. Nabin Chandra 36 Ind. Cas. 803 : 21

C.W.N. 400 : 44 C. 720 35 C.L.J. 351; Ram Sundar Karmokar v. Lochan 38 Ind. Cas. 942; Swarnomoyi v. Adu 39 Ind. Cas. 119 and Bepin Chandra Barua v. Jagat Chandra Nath 51 Ind. Cas. 962 : 23 C.W.N. 84 no (lxxxiv). These case s are based on the decision of the Full Bench and must stand or Full with it. Nor need we examine the position when an occupancy ryot effects a voluntary transfer of his holding for value by way of sale or mortgage, as in Bhagirath Changa v. Sheikh Hafizuddin 4 C.W.N. 679; Ram Pershad Koeri V. Jawahir Roy 7 C.L.J. 72 : 12 C.W.N. 899 and Shyama Charan v. Mokhada Sundari Debi 10 Ind. Cas. 49 : 13 C.L.J. 481 : 15 C.W.N. 703, or makes a gift, as in Behari Lal v. Sindhubila 41 Ind. Cas. 878 : 22 C.W.N. 210 : 27 C.L.J. 497 : 45 C. 434, or makes a testamentary devise the roof. as in Amulya Batan Sarkar v. Tarini Nath Bey 27 Ind. Cas. 235 : 18 C.W.N. 1290 : 21 C.L.J. 187 : 42 C. 254; Kunja Lal Roy v. Umesh Chandra Roy 27 Ind. Cas. 352 : 18 C.W.N. 1294 and Umesh Chandra Dutta v. Joy Nath Das 43 Ind. Cas. 779 : 22 C.W.N. 474. The decisions in case s of voluntary transfer for value were based on the application of what is desorbed sometimes as the principle of estoppel, sometimes as the principle that the transferor is bound by his act or cannot derogate from his grant. On the other hand, the decisions in cases of involuntary sales, where the ryot with knowledge omitted or failed to object to the transfer, were based on the principle of acquiescence or waiver. There were manifest difficulties in the application of all such doctrines, because if the right of occupancy was a purely ' personal right ' or 'personal privilege, ' it is not easy to appreciate how it could in fact be made transferable by invoking the aid of one or other of these principles of law; the transferee, even if accepted by the landlord, might only have a new tenancy as suggested in Tara Pershad v. Surjo Kant 15 W.R. 152. Assuming, however, that it might thus acquire a character of trans friability as between transferor and trans free, it would not afford protection as against third parties ; yet barring possibly, two case s Agarjan Bibi v. Panaulla 6 Ind. Cas. 452 : 37 C. 687 at p. 693 : 14 C.W.N. 779 : 12 C.L.J. 169 and Basarat Mandal v. Sabulla Mandal 2 C.W.N. cclxxix (279) notes, no trace can be found of a reported decision where the title of the transferee of a non-transferable occupancy holding has been successfully impeached by an absolute trespasser. But we need not investigate further the validity of the reasons which underlie the various reported cases. We are concerned in the present instance with the question of

involuntary alienation alone; that, in our opinion, stands on the same footing as the question of voluntary alienation, the rule as regards which is too firmly settled to be successfully shall ended.

27. Our conclusion is that the case of Bhiramali v. Gopi Kant 24 C. 355 : 1 C.W.N. 396 : 12 Ind. Dec. (N.S.) 904 was erroneously decided and that the decision of the Full Bench in Dayamoyi v. Ananda Mohan Roy 27 Ind. Cas. 61 : 42 C. 172 : 18 C.W.N. 971 : 20 C.L.J. 52 (F.B.) cannot be supported in so far as it affirmed the rule enunciated therein as modified and developed in later eases. The confusion which has pervaded the discussion of this question is attributable in a large measure to the ambiguity involved in the statement that 'an occupancy holding is not transferable except by custom or local usage.' This may imply one of three alternatives. In the first place, it may be maintained that an occupancy holding is absolutely inalienable by its nature. This view might possibly have been maintained towards the close of the eighteenth century but haft apparently few, if any, champions at the present day. In the Second place, the expression may signify that an occupancy right cannot be transferred unless both the landlord and the tenant consent. This was the view put forward for the first time in 1897 and has held the field upto the present time. There is, however, nothing to indicate that the Legislature ever intended to impose a disability on the occupancy ryot with a view to protect the helpless cultivator from rapacious money-lenders, as appears to have been the policy which actuated the framers of the Punjab Land Alienation Act, 1900. In the third place, the expression may signify that the transfer of an occupancy holding, whether voluntary or involuntary, cannot be made effective except with the consent of the landlord. This was the view maintained from 1834 to 1897. For reasons already assigned, we hold that the third view is correct and was, through oversight or error, negatived in 1897.

28. The result of our decision may be. briefly summed up:

(1). The Base of Bhiramali v. Gopi Kant 24 C. 355 : 1 C.W.N. 396 : 12 Ind. Dec. (N.S.) 904 was erroneously decided.

(2). The decision of the Full Bench in Dayamoyi v. Amanda Mohan Roy 27 Ind. Cas. 61 : 42 C. 172 : 18 C.W.N. 971 : 20 C.L.J. 52 (F.B.) requires partial

modification, namely, the following should be substituted for the first proposition enunciated therein regarding the transfer for value of occupancy holdings apart from custom or local usage.

1. The transfer of the whole or a part is operative as against the ryot, whether it is made voluntarily or involuntarily.

29. When voluntary and involuntary transfers are thus placed in the same category so far as the ryot is concerned, no difficulty can arise under Section 63 of the Civil Procedure Code, which makes saleable in execution all property belonging to the judgment-debtor over which he has a disposing power, thus prescribing precisely the name test as was formulated by Mr. Justine Jackson in Dwarka Nath Misser v. Hurrish Chunder 4 C. 925 : 4 C.L.R. 130 : 2 Ind. Dec. (N.S.) 585, namely, that the measure of the liability to involuntary alienation is the power of voluntary alienation.

30. We have been finally pressed on behalf of the judgment-debtor to adhere to the rule enunciated in Bhiramali v. Gopi Kant 24 C. 355 : 1 C.W.N. 396 : 12 Ind. Dec. (N.S.) 904, even though we should hold it erroneous in principle, as it was decided more than twenty years ago. Reliance has been placed in support of this contention upon the decisions of the House of Lords in The Mediana (1900) A.C. 113 : 69 L.J.P. 35 : 82 L.T. 95 : 48 W.R. 398 : 9 Asp. M.C. 41 : 16 T.L.R. 194 and Kreglinger v. New Fatagonia Meat and Cold Storage Co. (1914) A.C. 25 : 83 L.J. Ch. 79 : 109 L.T. 802 : 58 S.J. 97 : 30 T.L.R. 114. We are sensible of the importance of maintaining, wherever possible, the authority of long established decided cases; but this doctrine is manifestly not of universal application. Lord Cran worth observed as follows in Young v. Robertson (1862) 4 Macq. 314 at p. 325:

There is another duty incumbent on all Courts, and pre-eminently upon a Court of ultimate appeal, and which has been invariably observed, namely, that as regards those rules which regulate the settlement and devolution of property, those Courts which have to interpret instruments and Act s of parties must take care to be very guarded against letting any supposed notions as to the inaccuracy of any rule which has in fact been acted upon induce them to alter it so as to endanger the

security of property and titles.

31. Lord Chelmsford considered the matter from the point of the duty of a Court of ultimate appeal when he observed as follows in Mersey Docks and Harbour Board v. Cameron (1864) 11 H.L.C. 443 at p. 510 : 11 E.R. 1405 : 20 C.B. (N.S.) 56 : 35 L.J.M.C. 1 : 11 Jur. (N.S.) 746 : 13 W.R. 1069 : 12 L.T. (N.S.) 643 : 145 R.R. 255 : 144 E.R. 1024:

The Courts rightly abstain from overruling cases which have been long established because, if they did so, they would only disturb without finally settling the law. But when an appeal from any of their judgments is made to this House, however they may be warranted by previous authorities', the very object of the appeal being to bring those authorities under review for final determination, the House a an not, upon the principle of stare decisis, refuse to examine the foundation upon which they rest.

32. Equally explicit is the pronouncement of Lord Loreburn in West Earn Union v. Edmonton Union (1908) A.C. 1 : 77 L.J.K.B. 85 : 98 L.T. 1 : 72 J.P. 9 : 6 L.G.R. 39 : 24 T.L.R. 108:

Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and especially where the subsequent course of judicial decisions had disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, I consider it is the duty of the House (of Lords) to overrule them, if it has not lost the right to do so by itself expressly affirming them.

33. The same principle has been followed in this Court and case s are not wholly unknown where Full Bench decisions have been overruled by Special Benches; Bee, for an instance, Jogodanund Singh v. Amrita Lal 22 C. 767 (F.B.) : 11 Ind. Dec. (N.S.) 509, which overruled the three Full Bench case s of Lal Mohun Mukerjee v. Jogendra Chunder Roy 14 C. 636 (F.B.) : 7 Ind. Dec. (N.S.) 422; Uzir Ali v. Ram Komal Shaha 15 C. 383 (F.B.) : 7 Ind. Dec. (N.S.) 839 and Ginsh Chandra Basil v. Apurba Krishna Dass 21 C. 940 (F.B.) : 10 Ind. Dec. (N.S.) 1259.

The Judicial Committee have also not hesitated to overrule long standing decision s of Indian High courts; Sri Balusu Gurulingatwami v. Sri Balusu Ramalakshmamma 30 M. 426 : 9 Bom. L.R. 1104 : 4 A.L.J. 625 : 11 C.W.N. 1005 : 6 C.L.J. 379 : 2 M.L.T. 333 : 17 M.L.J. 444 : 34 I.A. 186 (P.C.); Vasudeva Mudaliar v. Srinivasa Pillai 30 M. 426 : 9 Bom. L.R. 1104 : 4 A.L.J. 625 : 11 C.W.N. 1005 : 6 C.L.J. 379 : 2 M.L.T. 333 : 17 M.L.J. 444 : 34 I.A. 186 (P.C.).

34. In the present case there are, moreover, three special features which cannot entirely be overlooked. In the first place, the decision in Bhiramali v. Gopi Kant 24 C. 355 : 1 C.W.N. 396 : 12 Ind. Dec. (N.S.) 904 departed from what had been the law for over sixty years. In the Second place, the current of decisions since then has not been absolutely uniform. In the third place, we are called upon only to remove what has hitherto been erroneously regarded as a fetter upon the right of an execution creditor to realise his dues by the sale of an occupancy holding. The case, therefore, Fulls within the principle recognised by the Court of Appeal in Andrews v. Gas Meter Co. (1897) 1 Ch. D. 361 : 66 L.J. Ch. 246 : 76 L. T. 132 : 45 W.R. 321, by the Judicial Committee in Sri Balutu Gurulingaswami v. Sri Balusa Ramalakihmamma 22 M. 398 (P.C.) : 8 Ind. Dec. (N.S.) 286 : 21 A. 460 : 9 Ind. Dec. (N.S.) 1001 : 1 Bom. L.R. 226 : 3 C.W.N. 427 : 9 M.L.J. 67 : 26 I.A. 113 : 7 Sar. P.C.J. 330 and by the House of Lords in West Ham Union v. Edmonton Union (1908) A.C. 1 : 77 L.J.K.B. 85 : 98 L.T. 1 : 72 J.P. 9 : 6 L.G.R. 39 : 24 T.L.R. 108. Our decision will not embarass trade or acmmerce, nor will it affect transactions which may have been adjusted, rights which may have been determined, titles which may have been obtained or personal status which may have been acquired, Decree holders will find that they possess a power which has hitherto been denied to them. No doubt, judgment-debtors like the respondent before us (who, as was found by the trial Court, can easily pay up the decree if he will, but is unwilling to pay it up) will no longer be able to escape payment of their just liabilities. That surely is a result which need not make us hesitate to lay down the law correctly.

35. We hold accordingly that the question before the Special Bench should be answered in the affirmative and that the sole landlord of a ryot is competent to sell, in execution of a money decree against the ryot, his occupancy holding, whether the holding be or be not transferable by custom or local usage. The appeal must

accordingly be decreed and the application for execution allowed with costs in all the Courts, including costs of the bearing before the Division Bench and the Special Bench. The hearing fee is assessed at three gold mohurs on each occasion.

Fletcher, J.

36. I agree.

Chatterjee J.

37. I agree.

Teunon, J.

38. I agree.

Richardson, J.

39. I agree.

Chauduri, J.

40. I agree.

Huda J.

41. I agree.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com