Privy Council Appeal No. 63 *of* 1930.
Bengal Appeal No. 24 *of* 1929.

Turner Morrison and Company, Limited - - - - *Appellants*

v.

Monmohan Chowdhury *alias* **Panchkari Chowdhury** - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JULY, 1931.

Present at the Hearing:
LORD RUSSELL OF KILLOWEN.
SIR LANCELOT SANDERSON.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

The question in dispute in this appeal is as to the right of the respondent to eject the appellants from certain plots of land in Mauza Gosaildanga, a village on the outskirts of Chittagong. The plots are shown by their survey numbers on a plan which was proved in the case. They form part of a revenue paying estate known as Taraf Asad Mosad Khan. The *taraf* was sold on the 19th May, 1913, for arrears of revenue, and was purchased by the executor of one Aparna Charan Chowdhury, the father of the respondent, in whom the title to the estate now is. An issue was raised at the trial of the suit as to the *bona fides* of the sale, but both Courts in India have found this issue in the respondent's favour, and their Lordships see no reason to question the correctness of their finding on this point.

The plots were purchased in 1904 by the firm of Turner Morrison & Co., who transferred them in 1914 to the limited company of the same name, who are the appellants before the Board. They were used for manufacturing purposes, and were,

in part, occupied by offices and godowns. On one plot there was a tank. Some of the plots had previously been held by *raiyats*, and were so recorded in the record of rights, which was prepared in 1898.

The appellants and before them, the firm, were the tenants, not of the respondent, but of a subordinate *talukdar*, to whom they paid a small rent, all the plots being included in the *taluk*, which was known as Taluk Ram Mohan. The existence of this *taluk* as a subordinate tenure of the *taraf* was disputed by the respondent, but it appeared in the record of rights, and both Courts in India have affirmed its existence, and the fact that the appellants hold under it.

The suit was instituted by the respondent on the 16th April, 1923, nearly 10 years after the sale of the estate. He based his claim to eject the appellants, who were the only defendants to the suit, upon the provisions of section 37 of the Bengal Land Revenue Sales Act, XI of 1859. The section is in the following terms :—

> " *Rights of a Purchaser of a Permanently-settled Estate sold for its own Arrears.*—The purchase of an entire estate in the permanently-settled districts of Bengal, Bihar and Orissa, sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement; and shall be entitled to avoid and annul all under-tenures, and forthwith to eject all under-tenants with the following exceptions :—
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> " Firstly.—*Istimrari* and *mukarrari* tenures which have been held at a fixed rent from the time of the Permanent Settlement.
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> " Secondly.—Tenures existing at the time of settlement, which have not been held at a fixed rent; Provided always that the rents for such tenures shall be liable to enhancement under any law for the time being in force for the enhancement of the rent of such tenures.
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> " Thirdly.—*Taluqdari* and other similar tenures created since the time of settlement and held immediately of the proprietors of estates, and farms for terms of years so held when such tenures and farms have been duly registered under the provisions of this Act.
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> " Fourthly.—Leases of lands whereon dwelling-houses, manufactories or other permanent buildings have been erected, or whereon gardens, plantations, wells, tanks, canals, places of worship, or burning or burying grounds have been made, or wherein mines have been sunk.
>
> " And such a purchaser, as is aforesaid, shall be entitled to proceed in the manner prescribed by any law for the time being in force for the enhancement of the rent for any land coming within the fourth class of exceptions above made, if he can prove the same to have been held at what was originally an unfair rent, and if the same shall not have been held at a fixed rent, equal to the rent of good arable land, for a term exceeding twelve years; but not otherwise.
>
> " *Proviso.*—Provided always that nothing in this section contained shall be construed to entitle any such purchaser as aforesaid to eject any *raiyat* having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force, or to enhance the rent of any such *raiyat* otherwise than in the manner prescribed by such laws, or otherwise than the former proprietor, irrespectively of all engagements made since the time of settlement, may have been entitled to."

The respondent relied in his plaint on the provision that the purchaser should acquire the estate free from encumbrances. His case was that the tenancies of the appellants were encumbrances which were determined by the sale. This was denied by the appellants, who contended that the *taluk* under which they held had not been avoided or annulled by the respondent, and that so long as it stood they could not be ejected by him. They further alleged that there were permanent buildings on the land which brought them within the fourth exception, and they also claimed the protection of the proviso, on the ground that the land was entered as *raiyati* in the record of rights.

The question of permanent buildings has not been pressed before the Board. The Subordinate Judge of Chittagong, by whom the suit was tried, held that the only permanent building was the tank, and that the suit failed on this ground only with regard to the plot upon which the tank was built. His finding both as to this plot and as to the non-existence of permanent buildings upon the other plots, was affirmed on appeal.

The question of the proviso can also be disposed of without difficulty. The Subordinate Judge was satisfied that four of the plots, the subject of the suit, were *raiyati* holdings at the time of the settlement. He did not think that the appellants were themselves *raiyats*, but he held that "*raiyat*" in the proviso also included the successors in interest of *raiyats*, construing the term by the definition contained in section 5 (2) of the Bengal Tenancy Act of 1885. The High Court, on appeal, thought that there was no justification for this, and that there being no definition of *raiyat* in the Act of 1859 it must be read in its ordinary sense of a cultivator. Their Lordships have no doubt that the view taken by the High Court was right, and that the proviso has no application to the appellants.

There remains the question as to the *taluk*, which was the principal issue in both the Courts. The Subordinate Judge held that the plaintiff must fail "on the ground that the intermediate *taluk* under which the disputed lands are held has not been annulled," and he accordingly dismissed the suit. The judgment of the High Court was delivered by B: B. Ghose J., and he came to the opposite conclusion. The learned Judge refers to the *taluk* as an encumbrance, and speaks of a purchaser under the Act of 1859 as being entitled "to annul encumbrances," which is not, their Lordships think, in accordance with the words of the section. Some confusion has perhaps been introduced by references to the corresponding provisions of the Bengal Tenancy Act, and the voluminous case law to which it and its predecessors in the statute book have given birth; but the two Acts are not, their Lordships think, *in pari materia*, and the differences between them are considerable. No doubt under the Bengal Tenancy Act an intermediate tenure would be an "incumbrance": see section 159 and section 161, where incumbrance

is defined. But in their Lordships' opinion it is not so under section 37 of the Revenue Sales Act of 1859. This section draws a clear distinction between " encumbrances " and " under-tenures." Encumbrances are wiped out by the sale ; in the case of under-tenures the purchaser is only " entitled to avoid and annul " them, and on doing so, that is upon exercising his option to annul, he can eject all under-tenants. What is intended by the expressions " under-tenures " and " under-tenants " is shown by the exceptions that follow. The third exception refers to " *talukdari* and other similar tenures." These can be annulled by the purchaser unless they fall within the provisions of the exception. The *taluk* in the present case, therefore, is, their Lordships think, an under-tenure within the meaning of the section, and the purchaser's right in respect of it is only a right to annul. It is clearly something different from an encumbrance whatever that term may be intended to include. A similar differentiation appears in section 11 of the Patni Regulation (VIII of 1819), though it apparently finds no place in the Tenancy Act.

Unless and until the *taluk* is annulled it continues : the *talukdar* becomes the under-tenant of the purchaser and the tenants holding under him are not affected by the change of proprietorship. There is no privity of contract between them and the purchaser, and the latter cannot either claim rent from them or eject them so long as he allows the *taluk* to continue. The purchaser could, no doubt, sue for possession of the holdings joining both the *talukdar* and the *talukdar's* tenants. The institution of such a suit would be an effective election to annul the *taluk*, and the joinder of the persons in actual possession would be in accordance with the ordinary procedure. But their Lordships are unable to see what cause of action the purchaser can have against the tenants of the *talukdar* as long as the *taluk* subsists. Their contract is with him and their liability is to him and not with or to his superior landlord.

Their Lordships think that no useful purpose would be served by a discussion of cases under the Bengal Tenancy Act or the preceding Rent Acts. No case has been cited to them which militates against the construction which they have placed upon the section and which seems to be in accordance with the plain meaning of the words. Reliance has been placed upon *Titu Bibi* v. *Mohesh Chunder*, I.L.R. 9, Calc. 683, where some reference is made to cases decided under the Revenue Sales Act and to the analogy to be drawn from them in dealing with sales under the Rent Acts, but their Lordships are unable to regard this as any authority upon the construction of the section with which they have to deal in the present appeal. In *Titu Bibi's* case the question was whether upon the sale of an under-tenure for arrears of rent under the provisions of Bengal Act VIII of 1869, a tenure subordinate to that sold was, *ipso facto*, avoided by the sale, or whether it continued to subsist until the purchaser by some overt

act indicated his intention to exercise his power of avoidance. The Full Bench affirmed the second alternative, but they also held that an "under-tenure" (meaning apparently a tenure subordinate to the tenure sold) was an incumbrance within the meaning of section 66 of the Act they were considering. There is no need for their Lordships to consider whether the latter part of this decision was right or wrong, though the references in the judgment are somewhat confusing and necessarily detract from its value. The difference between section 66 of Act VIII of 1869 and section 37 of Act XI of 1859 with which alone their Lordships are concerned, is manifest. The former section says nothing about avoiding or annulling subordinate tenures: it merely provides that on a rent sale the purchaser shall acquire the tenure sold "free from encumbrances."

It is not disputed by counsel for the respondent that for the annulment of the *taluk* notice in some form or another must be given by the purchaser. That a sale for arrears of revenue does not, *ipso facto*, have the effect of putting an end to the under-tenure is clear from the words of the section. It was so held by this Board in *Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy*, 10 Moo., I.A. 123, under an earlier Regulation in which the words used were almost emphatic in the purchaser's favour. In the lower Court there does not appear to have been any suggestion that the respondent had intimated to the *talukdar* that his tenure was at an end. The *talukdar* was not joined as a party, and no issue was raised upon the point. The respondent's case throughout was that there was no such *taluk* in existence. The High Court, however, fortify their conclusion on the main issue by an alternative finding that notice of annulment was in fact given. The *talukdar*, one Jatra Mohan, was examined as a witness for the appellants, and he deposed that after the sale an employee of the respondent asked him to pay *najar* and take a fresh settlement, which he refused to do. The learned Judges thought that this was "a sufficient expression of the intention on the part of the auction-purchaser to avoid the *taluk*."

Their Lordships are unable to accept this finding. That the *talukdar* did not regard it as an annulment of his tenure is clear from the fact that he received his rent from the appellants down to the institution of the suit, and there is certainly no reason for imputing dishonesty to him. Moreover, for 10 years after the sale the respondent took no steps to assert his right to possession. But apart from this and the ambiguous character of the evidence upon which the High Court relied, it is clear that the respondent up to the last denied the existence of the *taluk* or any *talukdari* rights in Jatra Mohan. He applied to the High Court to be allowed to give further evidence in support of his appeal "for the purpose of showing that there was no intermediate tenure in existence." This application was refused and the existence of the *taluk* was affirmed. Their Lordships think that under these circumstances there was no justification for the finding that the

respondent had exercised the option conferred upon him by the section of avoiding or annulling the *taluk*. In any case they think that it would be wrong to come to such a conclusion when the *talukdar* was not before the Court.

While the appeal was pending in the High Court steps were taken by the Government for the acquisition of the plots in dispute under Act I of 1894, and the decree of the High Court was based upon the assumption that these proceedings would be carried to their ordinary conclusion. Subsequent to the date of that decree, however, it appears that Government abandoned the acquisition proceedings, and the respondent petitioned for leave to cross-appeal to His Majesty in Council for the purpose of having the High Court's decree varied accordingly. This petition came before the Board with the appeal, but in view of the conclusion to which their Lordships have come upon the appeal, it is unnecessary for them to deal with it further.

For the reasons given their Lordships are unable to support the decree of the High Court. In their opinion it should be set aside and the decree of the Subordinate Judge restored, and the respondent's petition dismissed, and they will humbly advise His Majesty accordingly. The respondent must pay the costs in the High Court and before this Board.

In the Privy Council.

TURNER MORRISON AND COMPANY, LIMITED,

v.

MONMOHAN CHOWDHURY alias PANCHKARI CHOWDHURY.

DELIVERED BY SIR GEORGE LOWNDES.

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