

(1948) 09 CAL CK 0029

In the Calcutta High Court

Case No : Appeals from Appellate Decree Nos. 1131 & 1132 of 1944

Dharam Chand Seraogi and Others

APPELLANT

Vs

Jillar Rahman Mondal alias Mia
 Jillar Rahman Mondal
alias Mia Vs Dharam Chand Seraogi and Others

RESPONDENT

Date of Decision : 22-09-1948

Acts Referred:

Citation : (1948) 09 CAL CK 0029

Judgement

Sen, J.—These two appeals are by the Defendant No. 1 and arise out of two rent suits. The point which arises for decision in both the appeals is exactly the same and this judgment shall govern both the appeals. The Plaintiffs sued the Defendant for rent with respect to certain land at the rate of Rs. 3-3-171/2 gandas for an area of 2.09 acres, one suit being for the period, 1344 B.S. to Aswin 1346 B.S., and the other suit being with respect to the period, 1346 B.S. to Pous 1349 B.S. The appeals from the decisions of these suits are Second Appeals 1131 of 1944 and 1132 of 1944 respectively. The defence taken in both the suits was that the original area of the land was 9 acres. A part of the land measuring 7 acres went under water before 1928 and the land re-appeared in 1939. The Defendant is in possession of the entire land measuring 9 acres. The Defendant contends that he is a tenant of the entire land at a rental of Rs. 13-13-10 gandas and that the Plaintiffs are not entitled to treat him as a tenant with respect to 2.09 acres only of land at a rental of Rs. 3-3-171/2 gandas. I may mention here that after the land went under water the Plaintiffs sued the Defendant for rent in the year 1928 claiming rent for the entire land. The Defendant claimed abatement of rent and his claim was allowed and the suit was decreed at the rate of Rs. 3-3-171/2 gandas for 2.09 acres. This decree was passed on the 12th of May, 1928. In 1932 the Plaintiffs again sued the tenant claiming rent for the entire land and the Defendant claimed abatement on the ground of diluvion and that claim was allowed and the suit was decreed for rent at the rate of Rs. 3-3-171/2 gandas for the area of 2.09 acres. The question for decision is whether in these circumstances the Defendant can claim that his

tenancy right with respect to the entire land still subsists.

2. In this connection the changes in the law laid down by the Bengal Tenancy Act will have to be looked into. Before 1928 the law was that if the land of a tenancy was diluviated, the Defendant was entitled to claim abatement of rent and by making such claim the Defendant did not lose the right to resume the land after it had reappeared and treat it as a portion of his tenancy. This was laid down in the case of *Secretary of State for India in Council v. Midnapore Zemindary Company, Ltd.* L.R. 64 IndAp 281 : S.C. 41 C.W.N. 106 (1937). Then came an amendment of the law in 1928 and sec. 86A was introduced. The relevant part of sec. 86A, sub-sec. (2) says that if any portion of the land of a tenure or holding is lost by diluvion and the tenant obtains on that account an abatement of rent in respect of such portion the tenant shall, unless there is a contract to the contrary made by registered instrument, be deemed to have surrendered his rights in such lands or portion thereof, as the case may be, and his tenancy and rights therein shall be extinguished. Now the first suit by the landlord which was instituted by the Plaintiffs in 1928 and in which abatement was granted was governed not by sec. 86A but by the general law laid down by the Judicial Committee in the case mentioned above. Sec. 86A of 1928 had not then come into force. Therefore the tenant by claiming abatement did not lose his rights with respect to the land which had been diluviated and he was entitled, on the land re-appearing, to treat it as part of his tenancy; but the Defendant now has a difficulty in his way because in the year 1932 a suit was instituted by the landlord against the tenant for the rent of the entire land and the tenant claimed abatement. That claim was allowed. At that time sec. 86A which had been introduced by the amendment of 1928 was in force. It, therefore, had the effect of extinguishing the tenancy rights of the Defendant with respect to the land which had been diluviated. The learned Advocate for the Appellant contends that the abatement claimed in the suit of 1932 was based on the abatement which had already been granted before the 1928 amendment had come into force and that, therefore, sec. 86A as it stood in 1928 would have no application. I cannot appreciate this argument. The decree passed granting abatement in 1928 does not operate as *res judicata*, the decree being in a rent suit. In the suit of 1932 there was a fresh claim for abatement and that claim was allowed and in my opinion the allowance of that claim for abatement would at once attract the operation of sec. 86A as it stood in 1928 which would have the effect of extinguishing the Defendant's right of tenancy with respect to the diluviated land.

3. The amendment of 1928, it is true, is no longer in existence because it has now been replaced by a new sec. 86A. This section came into force in August, 1938. The learned Advocate for the Appellant at first sought the aid of this section and contended that it would have a retrospective effect. The present sec. 86A, sub-sec. (2) says this :--

Notwithstanding anything contained in this Act or any other law or any contract to the contrary, the right, title and interest of the tenant or his successors-in-

interest shall subsist in such lands or portion thereof during the period of loss by diluvion not exceeding twenty years and the tenant or his successor-in-interest shall have right to immediate possession on the re-appearance of such lands or portion thereof within twenty years of the loss by the diluvion and the landlord shall have right to the arrears of rent without interest or damage in respect of the land which has reappeared for the period during which it was lost or for four years whichever is less.

4. It is quite clear from the wording of the sub-section that no retrospective effect was intended. It is a well-known principle of construction of statutes that a statute shall not be given retrospective effect unless there is a clear indication from the terms of the statute that such effect was intended. Sub-sec. (2) says that the right, title and interest of the tenant shall subsist in such lands or portion thereof during the period of loss by diluvion. This presupposes that the right existed at the time sec. 86A came into force. I think that the right cannot subsist unless it existed. Subsists means " continues to exist." In the present case the right of Defendant No. 1 with respect to the diluviated land was completely extinguished before 1938. No question of subsistence of that right can, therefore, arise. The learned Advocate for the Appellant finally conceded that this must be so and he agreed that if it be correct to say that the right was extinguished by virtue of the provisions of sec. 86A as it stood in 1928, sec. 86A as it stands now cannot revive that right.

5. In these circumstances, I hold that the decisions of the Courts below are right and I dismiss both these appeals with costs. The Respondent No. 1 (d) is a minor represented by the Deputy Registrar guardian ad litem. Mr. Bhattacharjee who appears for the other Respondents cannot appear for the minor Respondent as the Deputy Registrar who is appointed his guardian ad litem has not been removed.