
(1952) 01 CAL CK 0003
In the Calcutta High Court
Case No : A.F.A.D. No. 559 of 1948

Esmail Pailan

APPELLANT

Vs

Sailendra Nath and Others

RESPONDENT

Date of Decision : 07-01-1952

Acts Referred:

Bengal Tenancy Act, 1885 — Section 178, 178(1), 179, 23A, 48G

Citation : AIR 1952 Cal 779

Hon'ble Judges : P.N. Mookerjee, J

Bench : Single Bench

Advocate : Syamacharan Mitter, for the Appellant; Harideb Chatterjee, for the Respondent

Judgement

P.N. Mookerjee, J.—In this second appeal, which is at the instance of the tenant-defendant, some important and interesting questions arise for consideration. They relate chiefly to the rights of the parties who are admittedly the landlords and the tenant with regard to the trees on the suit land, and the ascertainment of those rights involves inter alia the determination of their status, that is, within which class of tenants under the Bengal Tenancy Act the tenure-holder, including the under-tenure holder, raiyat, and under-raiyat, they respectively fall, and, further, whether the tenant defendant has a right of occupancy in his land. Having regard to the findings of the Court of appeal below, they also necessarily include within their scope the specific question of the rights of an under-raiyat having a right of occupancy in his land with regard to the trees thereon. The determination of these questions depends upon the interpretation of the patta, Ex. 1, under which the tenancy in suit was created and upon the relevant provisions of the Bengal Tenancy Act, to wit, Sections 3 (5), 23, 23A, 48G, 178 and 179.

2. The suit out of which this appeal arises was brought by the landlords for a permanent injunction restraining the tenant-defendant from cutting away and/or appropriating the timber of certain trees on the suit land upon a declaration that

the said timber belonged not to the tenant but to the landlords and that, as such he, the tenant, had no right to the same. The plaintiffs' case was that the tenant in suit was governed by the terms of the patta, Ex. 1, and, under the said terms, the tenant-defendant had merely a Falkar right in respect of the trees in question and was not entitled to cut away or appropriate the same. In the plaint there was also an averment that, under the patta, Ex. 1, the defendant had mourashi mokarari right in the land in suit and the recording of the latter's status in the record of rights as that of an under-raiyat having a right of occupancy by custom in respect of the disputed land was erroneous.

3. The material defence was that the record of rights was correct, with the consequence that the tenant-defendant was an under-raiyat in respect of the suit land having a right of occupancy therein by custom and was, as such, entitled to cut away and appropriate all the trees upon his said land, any contract to the contrary notwithstanding, such contract being void under the Bengal Tenancy Act.

4. The learned Munsif, who tried the suit, found against the defendant on the question of his having a right of occupancy in the suit land. The learned Munsif also came to the conclusion that the patta, Ex. 1, merely conferred on the tenant a Falkar right in respect of the disputed trees and expressly prohibited him from cutting away or appropriating the same and reserved them to the landlords subject only to the above Falkar right in favour of the tenant. The learned Munsif also found that the plaintiffs, though recorded in the record of rights as occupancy raiyats, were really permanent tenure-holders in view of the recitals in the patta, Ex. 1, and in view of his other finding that the plaintiffs' predecessors, who had granted the patta, Ex. 1, were not cultivators. Presumably also, that is what appears on a close reading of the trial Court's judgment, the learned Munsif was of the opinion that the defendant was a mourashi mokararidar, that is not a raiyat but a tenure-holder though only in the sense of an under-tenure holder, so that the case was governed by Section 179, Bengal Tenancy Act and not by Section 178. The learned Munsif also expressed the opinion that Section 23A, Bengal Tenancy Act was not attracted to trees existing on the land at the time of the lease, particularly when under the terms of the lease, all rights to the trees were expressly denied to the tenant, save merely the right of Falkar, and that the defendant's right to trees, if any, under the said Section 23A even if this section were held applicable to this case, was restricted to trees grown subsequently to the lease created by the patta, Ex. 1. In the above view of the matter, the learned Munsif rejected the defendant's claim to the disputed trees and decreed the plaintiffs suit.

5. The defendant appealed and the learned Subordinate Judge reversed the finding of the learned Munsif and held in favour of the defendant on the question of his status and his finding was that the defendant was an under-raiyat in respect of the suit land with a right of occupancy therein by custom. The learned Subordinate Judge, however, was of the opinion that the disputed trees were not the subject of the defendant's lease but were withdrawn from the same and

that, therefore, the present case was really one where the trees in question were not leased out to the lessee and not one where, the terms of the lease merely restricted the lessee's right to trees. In this view of the matter, the learned Subordinate Judge eventually upheld the learned Munsif's decree in the plaintiffs' favour and dismissed the defendant's appeal.

6. It seems to me that the learned Subordinate Judge, having found that the defendant was an under-raiyat with a right of occupancy, was in error, if his said finding were correct, in holding that he was not entitled to the disputed trees.

7. u/s 48G (2) (i), Bengal Tenancy Act, an under-raiyat with a right of occupancy is entitled, as regards his immediate landlord, to the rights of an occupancy raiyat u/s 23A, which is one of the sections contained in chap. V of the Act and made applicable to such an under-raiyat under the said Section 48G (2) (i), and u/s 48G (2) (ii) again he is also entitled, in the same context, to the right, that is, to the protection, conferred by Section 178 on an occupancy raiyat. Under 3. 23A an occupancy raiyat possesses inter alia the rights "to fell (Vide Clause iii) and to utilise or dispose of the timber of" (Vide Clause iv) any tree on his land and u/s 179 (l) (h) such rights cannot be taken away or limited by any contract between the parties made before or after the Act. The language used in the two sections, namely, "any tree on such land" (Vide the last part of Section 23A) meaning by the words "such land" the land in respect of which the tenant has the right of occupancy (Vide the opening paragraph of Section 23A) anah. "trees on their holdings" (Vide Section 178 (l) (h) is comprehensive enough to include all trees, whether existing at the time when the lease or the contract is made, or subsequently grown, and, accordingly, the moment the tenant acquires occupancy right in the land his right to the trees becomes indefeasible and cannot be affected by any contract pre-existing or otherwise.

8. An argument was sought to be advanced that as Clause (h) of Section 178 (l) uses the words "take away or limit", the contracts vetoed are not contracts, made prior to the acquisition of the rights in question, that is prior to the acquisition of the rights in trees, as provided" in Section 23A of the Act; but that argument is hardly tenable in view of the opening words of Section 178 which make it applicable to all contracts whether made before or after the Act. The rights provided in Section 23A are rights created by the Act itself and, therefore, there will be no point in vetoing contracts, made before the Act, unless contracts made prior to the acquisition of the said rights are also meant to be affected by Section 178 (l) (h). This argument, therefore, is unacceptable and is, accordingly overruled.

9. Another argument was also advanced that Section 178 (l) (h) was restricted to occupancy raiyats and could not be extended to under-raiyats with rights of occupancy. This argument was founded on Clause (f) of Section 178 (1), which is a specific provision with regard to under-raiyats and it was contended that in view of that specific provision, dealing with under-raiyats, other parts of Section 178 would have no application to that class of tenants. This argument also is

plainly indefensible. It clearly overlooks the scheme of Section 178. That section in Clause (f) makes a general provision with regard to all under-raiyats whether with or without rights of occupancy. Under-raiyats with rights of occupancy, as distinguished from other under-raiyats, have the special rights created in their favour by Section 48G (2) of the Act, and Clause (ii), of the sub-s. 48G (2) clearly attracts to them the provisions of Section 178 applicable to occupancy raiyats, the words "so far as possible" merely indicating that the protection of Section 178 will not be available to under-raiyats, though having rights of occupancy, where the rights concerned are rights claimable by occupancy raiyats by virtue of and under provisions not extended to under-raiyats with rights of occupancy. That there are such provisions is clear from Section 48G (2) itself which extends only some provisions of the Act applying to occupancy raiyats to under-raiyats with rights of occupancy and also expressly excludes such under-raiyats from the benefits etc. of some of the other provisions applicable to occupancy raiyats, for example Sections 20, 21 and 22 of chap. V of the Act and also Section 169 (d).

There is also no case here that the land of the tenancy has been materially impaired in value, or rendered unfit for the purposes of that tenancy, so as to attract the limitation to Section 23A provided in its opening words and make (S. 23A) unavailable to the tenant. Clearly, therefore, if it can be found that the defendant is an under-raiyat with a right of occupancy, he must be held to have the right "to fell and utilise or dispose of the timber of" or to put in other words, to cut away and appropriate the trees on the land of his tenancy, (Vide Section 23A), that is, on his holding (Vide Section 178 (I) (h) and Section 3 (5), in other words, to cut away or appropriate the disputed trees, notwithstanding the terms of the patta, Ex. 1, and the plaintiff's suit must fail. The decision of the learned Subordinate Judge cannot, therefore, stand and it must be set aside.

10. The question, however, still remains whether in the circumstances of the present case, the plaintiffs' suit can or ought to be at once dismissed and that question cannot, in my opinion, be answered in the affirmative in view of the fact that one of the findings, as noticed above, of the learned Munsif was that the plaintiffs were permanent tenure-holders and the defendant was a mourashi mokararidar under them, so that Section 179 of the Bengal Tenancy Act was immediately attracted and preserved all the terms of the patta, Ex. 1, intact, notwithstanding Section 178 which had no application to the present case. This finding of the learned Munsif does not appear to have been considered by the learned Subordinate Judge and, as the position is unassailable that, unless the defendant is either a raiyat or an under-raiyat with right of occupancy, Section 178 (I) (h) will not come to his aid and the plaintiffs will be entitled to the disputed trees under the patta, Ex. 1, this case cannot be disposed of without properly deciding the question of status of the parties. The case must, therefore, go back to the lower appellate Court for a proper decision of that question and for the disposal of the appeal before it in accordance with the said determination and according to law and in the light of the observations and directions made and

given in this judgment.

11. As I feel, further, that the importance and implications of the question of status were not sufficiently realised by the parties in the Courts below, I grant leave to them to adduce further evidence, if they so desire, on that question and the lower appellate Court will take such evidence either itself or through the learned Munsif and then decide the appeal on the entire evidence, that is, on the evidence now on record and on such further evidence as may be adduced pursuant to the leave, now granted, in accordance with law and in the light of the observations made and directions given herein.

12. The result, therefore, is that this appeal is allowed and the case is remanded to the lower appellate Court, so that the appeal before it may be disposed of in accordance with law, in the light of the observations which I have made above and in accordance with the directions contained herein.

13. The costs of this appeal will abide the final it result.