

(1949) 04 PAT CK 0002

In the Patna High Court

Hari Narain Singh and Others

APPELLANT

Vs

Babui Mohari and Others

RESPONDENT

Date of Decision : 13-04-1949

Acts Referred:

Bihar Tenancy Act, 1885 — Section 183, 26A

Citation : AIR 1949 Patna 413

Hon'ble Judges : Agarwala, C.J.;Shearer, J;Meredith, J

Bench : Full Bench

Judgement

Shearer, J.—The question that arises in this second appeal is whether, by reason of the enactment of Section 26A, Bihar Tenancy Act, an occupancy raiyat, who holds his homestead otherwise than as part and parcel of his occupancy holding, has not acquired a right of property in it and is capable of making a valid transfer of it without the consent of his landlord. The subject-matter of the suit out of which the appeal arises was land which, for a great many years, was the homestead of one of the two sets of defendants, these defendants being settled raiyats of the village. Sometime prior to the institution of the suit they executed a sale deed purporting to convey it to the other set of defendants, and when the plaintiffs, who are the proprietors of the village, became aware of this, they sued to recover possession of the land. The Courts below have dismissed their suit, relying on the decision of Sinha and Das JJ. in *Maharaja Guru Mahadeoashram Prasad Sahi Bahadur Vs. Parikha Chaudhri and Others*, . In that case Sinha J. expressed himself as being strongly of opinion that the right which an occupancy raiyat had in his homestead, his homestead not being part and parcel of his occupancy holding, was a personal right and not a right of property. Nevertheless, Sinha J, felt himself compelled to acquiesce (?) in the view taken by Das J. that the suit of the landlord should be dismissed. What apparently weighed with Sinha J. was, in the first place, that, in his opinion, there was no direct authority on the point and, secondly, that the Courts below had been unable to determine what the local custom or usage in the matter of transferability of homesteads was. When this appeal came before Manohar Lall

and Mahabir Prasad JJ., they expressed doubts as to the correctness of the decision in *Maharaja Guru Mahadeoashram Prasad Sahi Bahadur Vs. Parikha Chaudhri and Others*, and, as that decision was binding on them and the Courts below were undoubtedly correct in regarding it as an authority which applied, directly to the present case, they referred the matter to His Lordship the Chief Justice, who decided that a Special Bench should be constituted to hear the appeal.

2. When it enacted the Bengal Tenancy Act, the legislature deliberately refrained from conferring on an occupancy raiyat a statutory right to transfer his holding and from attempting by law to regulate the exercise of that right. Instead, it left the matter to be dealt with everywhere by local custom or usage. This it did by enacting Section 183 of the Act and, the first of the two illustrations to that section. By enacting Section 182 of the Act it dealt in precisely the same manner with the right of a raiyat to transfer his homestead when his homestead did not form part of his holding. The Bihar Legislature has since amended the Act in order to confer on an occupancy raiyat a right to transfer his occupancy holding or a portion of his occupancy holding and although, through an oversight it has not, as the Bengal legislature has done, deleted the illustration to Section 183, it is clear that that has now become otiose or superfluous. It has not, however, amended Section 182 of the Act. It appears to me, therefore, that, unless the provisions contained in this section, can be said to have been repealed or amended by necessary implication, as the illustration to Section 183 has been, the position, so far as a raiyat's right to transfer his homestead is concerned, is still the same as it was when the Bengal Tenancy Act was placed on the statute book. Until the Bengal Tenancy Act was modified by the Bihar legislature in 1934, it was settled law that a transfer by an occupancy raiyat of his holding was voidable at the instance of the landlord, unless, by local custom or usage, the raiyat had acquired a right to transfer it without the landlord's consent. When an occupancy holding was transferred by a raiyat, and the landlord sought to evict the transferee, the onus u/s 101, Evidence Act, was on the transferee to prove the existence of a local custom or usage which conferred on the raiyat an unrestricted right of transfer. If the defendant in such a suit succeeded in proving the existence of such a local custom or usage, the suit was bound to be dismissed. If, however, he did not succeed, the suit was bound to be decreed. Exactly the same principles had to be applied in a case where the transfer was of a homestead and not of an occupancy holding. They appear, for instance, to have been applied in *Hari Nath Karmakar v. Raj Chandra Karmakar* 2 C.W.N. 122. Sinha J. at the commencement of his judgment in *Mahdeoashram Pd. v. Parikha* A.I.R.1946 Pat. 428, observed that:

This case has got to be decided on the footing that there is no custom or usage governing the incidents of this tenancy.

With the greatest respect, it appears to me that, on this point, my learned brother misdirected himself. When a Court is satisfied that, in a particular local

area, homesteads have been. transferred without the consent of the landlord, it may, if, in its opinion, there have been a sufficient number of such transfers, draw the conclusion that raiyats in that local area have acquired by usage an unrestricted right to transfer their homesteads. If, on the other hand, the Court is satisfied either that there have been no-such transfers or that the number of such transfers has been wholly inconsiderable, the conclusion which it is bound to draw is that the custom or usage to the contrary, namely, that homesteads are not transferable without the landlord's consent. The lower appellate Court which relied on the decision in *Maharaja Guru Mahadeoashram Prasad Sahi Bahadur Vs. Parikha Chaudhri and Others*, , appears to me to have fallen into the same error. The conclusion at which it has arrived is that while the defendants failed to prove the existence of the local custom or usage which they set up, the plaintiffs failed to prove affirmatively that it did not exist. This, in my opinion, must, in the second appeal, be taken as a finding that the defendants failed to discharge the onus which lay on them to prove the existence of the local custom or usage, in the absence of which, the conveyance which they had taken was voidable at the instance of the landlord.

3. One of the two main arguments which have been addressed to us is that the Bihar legislature, in enacting Section 26A, Bihar Tenancy Act,] impliedly, if not perhaps expressly conferred on occupancy raiyats a right to transfer their homesteads without the consent of their landlords. This argument was rejected by both *Sinha* and *Das JJ*. In my opinion, there is clearly no substance in it and it may be dealt with very shortly. If the legislature, in enacting Section 26A, had annexed to it a proviso stating that, for the purposes of the section, the homestead of an occupancy raiyat, when held otherwise than as part and parcel of his occupancy holding, was, for the purposes of the section to be deemed to be itself an occupancy holding, it might have been argued that the provisions contained in Section 26A and in Section 182 were so diametrically at variance with one another that it must necessarily be presumed that, in enacting the subsequent, the legislature intended to repeal the earlier, provision. In the absence, however, of any such patent ambiguity in the Act as it now stands, the Courts are bound so to construe the two sections and any other sections which have any bearing on the matter as to render them consistent with one another. I see no difficulty myself in doing this. A raiyat does not hold his homestead as a raiyat, as he takes the land, not for purposes of cultivation, but for building and residential purposes. Also, the incidents of his tenancy of his homestead are to be regulated primarily by local custom or usage and not by the statutory provisions which regulate the incidents of occupancy right. The expression "occupancy holding" did not occur in the Bengal Tenancy Act as it was originally enacted, but it is quite clear that the legislature intended to deal and did, in fact, deal in one manner with occupancy holdings and in quite another manner with the homesteads of raiyats which did not form part and parcel of their occupancy holdings. It has also to be remembered that Sections 26A to 26P which had been enacted in 1934. There is much in these earlier repealed provisions which make

it impossible to suppose that they were intended to apply to homesteads as well as to occupancy holdings. The learned advocate for the respondents has relied mainly on the definition of holding in Section 3(9) of the Act and on the circumstance that his clients, or rather their vendors, undoubtedly had a right of occupancy in their homestead. I very much doubt myself if a homestead comes within the definition of a holding, at all events when it is belagan or held rent-free. Even, however, if it can be brought within that definition, it is not open to us to decide this matter merely with reference to Section 3(9) and Section 26A of the Act. As I have already said, on well-accepted principles of construction, these sections must be read along with Section 182 and an endeavour must be made so to construe the sections taken together as to avoid any ambiguity or inconsistency. The only way of doing this is to assume that a homestead is not by itself an occupancy holding within the meaning of that expression as it occurs in Section 26A.

4. The other argument which has been addressed to us is that which commended itself to Das J. in *Maharaja Guru Mahadeoashram Prasad Sahi Bahadur Vs. Parikha Chaudhri and Others*, . Das J. quoted with approval the following observations made by Jwala Prasad J. in *Bishnath Singh Vs. Musammat Bibi Ayesha*, :

When a raiyat holds his homestead land, the incidents of the tenancy of his homestead will be regulated by the provisions of the let applicable to the class of land of which he is a raiyat.

If the intention of the legislature had been that, subject to local usage and custom, the incidents of an occupancy raiyat's tenancy of his home. Stead should be the same as the incidents of his tenancy of his occupancy holding, irrespective of the fact whether he had been in possession of his homestead for less than twelve years or for more than twelve years, one would expect it to have said so. The use of the word "raiyat" without any qualification, and also, perhaps the use of the word "regulated", appears to me to indicate that its intention was somewhat different. That intention was, I think, that, subject-to local usage or custom prescribing a shorter period, a raiyat should acquire a right of occupancy in his homestead when he had been in possession of it for twelve years and that, until he had been in possession for twelve years, his rights in it should be those of a raiyat who did not have a right of occupancy. The object of the-legislature was, it is quite clear, to give a raiyat, who held his homestead otherwise than as part of his holding, a certain measure of security of tenure in it. In the absence of any security of tenure, the raiyat might be coerced into agreeing to pay a greatly enhanced rent for his occupancy holding by threats of being evicted from his homestead. For practical purposes, the security thus given to a raiyat was substantially the same, whether he held in his homestead a right of occupancy or merely the right of a non-occupancy raiyat. It is true that, in the latter case, he could be ejected for non-payment of rent, but as by custom either no rent is payable for homesteads or the rent payable is almost always

insignificant, there was little danger of his being ejected in execution of such a decree. Das J. relied strongly on the decision of Rampini J. in *Golam Mowla v. Abdool Sowar Mondul* 13 Cri.L.J. 255. In that case a landlord sought to evict a raiyat from his homestead, of which he had apparently been in possession for less than twelve years, on the ground that he had executed a kabuliat binding himself to give up the land on the expiry of two years. The raiyat had not been let into possession of the land under this kabuliat and it is perfectly clear that the landlord was not entitled to eject him, even if he did not have a right of occupancy in the land. Rampini J. accepted the argument put forward on behalf of the landlord that the raiyat did not hold his homestead as a raiyat, nevertheless he affirmed the order of the Courts below dismissing the suit on the ground that he was a settled raiyat of the village and therefore, had a right of occupancy in his homestead. The reasoning is, to my mind, inconsistent and the soundness of it appears to have been doubted in the Division Bench case, *Harihar Chatterjee v. Dinu Bera* 14 Cri.L.J. 170, where, in very similar circumstance, the suit of a landlord was dismissed on the ground that the requirements of Section 45, Ben. Ten. Act, had not been complied with. The pro forma defendants in this suit had been in possession of their homestead for more than twelve years and in consequence had acquired a right of occupancy in it. What was the nature of this right? Sinha J. is of opinion that it was a purely personal right. In 1897, a Division Bench of the Calcutta High Court, of which Rampini J. was a member, in *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha* 24 Cal. 855, took the view that the enactment of the Bengal Tenancy Act had not altered the pre-existing law and that the right of occupancy which a raiyat could acquire in his holding was still, as had been laid down by a Full Bench of the Court in *Nurendro Narain Roy v. Ishan Chunder Sen* 22 W.R. 22, a right that was personal to the raiyat. This decision was not overruled until 1921 when the point was reconsidered by a Bench of seven Judges of the Calcutta High Court in *Chandra Binode Kundu Vs. Sheikh Ala Bux Dewan and on his death one of his heirs and Legal Representatives, Samartaban Bibi and Others*, . I should hesitate to subscribe to the view of Sinha J. that the right of occupancy which a raiyat has in his homestead is automatically extinguished when he ceases to be a raiyat. Is a widow who is unable to cultivate her husband's land and is compelled to surrender or abandon her holding also to be in danger of being deprived of a roof over her head? But, whether the right of occupancy in his homestead conferred on a raiyat by the Bengal Tenancy Act was a purely personal right or was something more than that, it was, quite certainly, not a right of property. Has that right now been conferred on him? Is a raiyat who has a right of occupancy in his homestead, for which he is not liable to pay rent, now entitled, not merely to sell his house for the value of the materials, but, in effect, to sell the site on which it stands and which has hitherto been recognised as belonging, subject to the raiyat's right of occupancy, exclusively to the landlord. Now, in the view taken by Das J. a right of property in their homesteads has not been conferred by the Legislature on raiyats everywhere. In a locality where a right of transfer has been asserted and successfully resisted by the landlord, the position remains

unchanged. In a locality, however, where the right has never been asserted the position has altered. It is obvious that such a result could not possibly have been intended by the Legislature, and, before coming to the conclusion that this is the inevitable consequence of faulty draftsmanship, one must be quite certain that the premise on which the argument rests is sound. With the greatest respect, I think myself that the whole argument is vitiated by the omission to realise that in a particular area where no custom or usage of transferability has yet even begun to grow up, what really exists is a custom or usage to the contrary. In my opinion, the Courts below have misdirected themselves in placing the onus on the plaintiff to show the non-existence of any local custom or usage of transferability instead of placing the onus on the defendants to show its existence. It is, I think, clear that, if the Courts below had not misdirected themselves on this vital point and had correctly placed the onus on the defendants, they would have been bound to decree the suit. I would, therefore, allow the appeal and decree the suit with costs, throughout.

Meredith J.

5. u/s 182, where a custom exists, the matter is regulated by that custom. I agree that when the tenant has failed to prove a custom of transferability the finding should be that there is a custom of non-transferability. For this reason I concur in the view that the appeal should be allowed.

Agarwala C. J

I agree.

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