
(1942) 05 CAL CK 0003
In the Calcutta High Court

Hirendra Lal Sarkar

APPELLANT

Vs

Smt. Kanaklata Choudhurani and Others

RESPONDENT

Date of Decision : 29-05-1942

Acts Referred:

Bengal Tenancy Act, 1885 — Section 26F

Citation : AIR 1942 Cal 510

Hon'ble Judges : Blank, J;B.K. Mukherjea, J

Bench : Full Bench

Judgement

B.K. Mukherjea, J.—These are four connected revision cases which arise out of certain proceedings u/s 26 F, Ben. Ten. Act, as it stands after the amendment of 1938, commenced by one Hirendra Lal Sarkar who is the petitioner in Civil Revn. Cases Nos. 1131 and 1132 of 1941, for pre-emption of certain shares in eleven occupancy holdings, which were sold by some of the cosharers to one Kanaklata Chowdhurani who is opposite party No. 1 in these two revision cases. These raiyati holdings are situated at Bausdroni in the district of 24 Parganas and two of the cosharer tenants, viz., Golam Rab Jamadar and Khatijan Bibi sold their 2 as. 15 gds. and odd share to Kanaklata Chowdhurani by a conveyance which was executed on 10th July 1939. On 4th November 1939, there was another conveyance executed by Abdul Khalek Munshi and others who had 4 as. 6 gds. and odd share in all these eleven holdings in favour of the same Kanaklata Chowdhurani. Hirendra Lal Sarkar who claimed to be a cosharer in these tenancies presented two applications, one on 4th October 1939 and the other on 4th March 1940, for pre-emption of the shares conveyed by the aforesaid two kabals to Kanaklata, in the Court of the Second Subordinate Judge of Alipore and they were registered as Misc. Cases Nos. 116 of 1939 and 20 of 1940. Both these cases were heard together and a number of defences were taken by Kanaklata Chowdhurani who resisted the petitioner's claim for pre-emption. The trial Court by its order dated 13th January 1941, rejected both these applications on the ground that they were not maintainable in law and that the deposits made by Hirendra were insufficient.

2. Against that order two appeals were taken by the petitioner Hirendra to the Court of the District Judge of 24-Parganas. The District Judge who heard these appeals reversed the judgment of the trial Court on both the points and allowed the petitioner's claim for pre-emption except with regard to two holdings which were recorded in khatian Nos. 71 and 307 of the C.S. records. With regard to these two holdings the tenants were described as occupancy raiyats who had acquired rent-free title by long possession and enjoyment and the District Judge held that these two must be taken to be holdings of raiyats at fixed rates which would not come within the purview of Section 26F, Ben. Ten. Act. Against this part of the order of the District Judge which dismissed his claim in respect of the two rent-free holdings Hirendra has obtained two rules which are Civil Revision Cases Nos. 1131 and 1132 of 1941. Kanaklata on the other hand obtained the other two rules being Civil Revision Cases Nos. 1270 and 1271 of 1941 against that part of the order of the District Judge which reversed the judgment of the trial Court and allowed the claim of the petitioner in respect of nine out of the eleven holdings. It would be convenient if we take these last two rules first. The trial Court held inter alia that the petitioner Hirendra Lal Sarkar being himself a cosharer in these tenancies by purchase was incapable of claiming pre-emption u/s 26F, Ben. Ten. Act. According to the Subordinate Judge the expression "cosharer tenants" as used in Section 26F, Ben. Ten. Act, excludes a cosharer by purchase; for otherwise it would defeat the object of the section which is to prevent introduction of strangers as cosharers in the property. The District Judge held on the other hand that this would be putting a too narrow construction upon the words of the section which are in themselves absolutely plain and unambiguous. Mr. Bajendra Chandra Guha who appears in support of these two rules obtained by Kanaklata does not dispute the interpretation put by the District Judge and he has given up the extreme contention which found favour with the trial Judge, viz., that Hirendra's claim for pre-emption was altogether untenable in law.

3. The only point which he has raised on behalf of his clients is that Hirendra acquired an interest in five out of the eleven holdings only on 28th July 1939, whereas the kabala by Golam Rab Jamadar and Khatijan Bibi was executed on 10th July 1939, As Hirendra was not a cosharer in these five holdings at the date of the purchase by Kanaklata, of the shares of Golam Rab Jamadar and Khatijan Bibi he had no right to apply for the purchase of this share u/s 26F, Ben. Ten. Act. We do not think that we can accept this contention as sound. If a cosharer by purchase is competent to apply for pre-emption u/s 26F, Ben. Ten. Act, it is enough, in our opinion, that he has acquired a share at any time before the application was presented, provided the application itself was made within time. In the case before us, the vendors of Hirendra undoubtedly had the right to apply for pre-emption and as before this right was lost by efflux of time they transferred their entire interest in the tenancy to Hirendra the latter would certainly step into the shoes of the former and be able to exercise the same rights which could have been asserted by them. The right of pre-emption is not a

mere personal right as was held by the trial Judge. It is a right exercisable by a cosharer by reason of his ownership of a portion of the tenancy and when the share in the tenancy to which the right is attached is transferred, the right goes along with it. We hold therefore that the view taken by the District Judge is right and these two rules, viz., 1270 and 1271 of 1941 must be discharged. We make no order as to costs. We now come to the other rules in which Hirendra figures as the petitioner and they raise a somewhat interesting point as to whether the provisions of Section 26F, Ben. Ten. Act, are at all applicable when the transfer is of a share in a niskar or rent-free holding belonging to an occupancy raiyat. The Court below answered the question in the negative relying on a decision of Edgley J., in Debendra Nath Majhi and Another Vs. Sarat Chandra Nayak and Others, where it was held by the learned Judge that Section 26G, Ben. Ten. Act, was not applicable to a mortgage of a niskar holding. The learned Judge was of opinion that there was no essential difference between the holding of a raiyat at a fixed rate and that of a niskar raiyat; and consequently as laid down in Section 18(2), Ben. Ten. Act, the provisions of Section 26P of the Act are excluded when there is transfer of a portion of rent-free holding, even if the tenant had occupancy rights in the same. Mr. Sen argues that the essential feature of a raiyati at fixed rate is that the rent or rate of rent is fixed in perpetuity; but when no rent is payable, no question of fixity of rent arises. The point is not free from doubt, and some difficulty arises by reason of the fact that no specific provision was made by the Legislature in respect of rent-free holdings of a raiyat.

4. u/s 3(17), Ben. Ten. Act, a "tenant" means a person who holds land under another person and is, or but for a special contract to the contrary would be, liable to pay rent for that land to that person. A rent-free holder is therefore a tenant and he can come under the category of different classes of tenants which are recognized in Section 4, Ben. Ten. Act. His rights and liabilities are thus dependent upon the status of his landlord and the particular purpose for which the tenancy was created. A rent-free holder who holds lands under another person for purposes of cultivation and whose landlord is not a raiyat himself may certainly be regarded as a raiyat. The question is whether he is to be treated as a raiyat at a fixed rate or an ordinary raiyat with or without rights of occupancy. We think that when a landlord grants a raiyati settlement of certain lands to another and it is agreed by and between the parties at the time of the inception of the tenancy that no rent would be payable in respect of the same, the tenant may, without impropriety, be considered to be a raiyat at a fixed rate. It is true that the rent is not fixed at a particular figure and is fixed at nil but the essential element of a mokerari holding, namely, that the landlord cannot demand any excess rent from the tenant, is present in such cases, and even if the tenant acquires occupancy rights by remaining in possession of the lands for 12 years or more the provisions of Sections 24, 27 and 28 to 38, Ben. Ten. Act, are ex hypothesi not applicable to them.

5. We think that it could not have been the intention of the Legislature that the tenants in such cases would. be subject to all the limitations and restrictions

regarding transfer and enjoyment of the lands as are set out in Sections 23A, 25 and 26 series of the Ben. Ten; Act A raiyat at a fixed rate enjoys higher rights than those of an ordinary occupancy raiyat because the landlord has reserved to himself only the right to a fixed amount of rent from the tenant which cannot be enhanced in future. The position of a tenant with regard to whom the landlord has given up his right to claim rent for all time to come cannot surely be in a worse position. His position rather approximates to that of a proprietor though some disabilities of a tenant might still attach to him. Thus he can be subject to such limitations and restrictions regarding transfer or enjoyment of the land as were agreed to between him and the landlord at the time when the tenancy originated. Again, if he acquires any contiguous land by right of accretion he would be liable to pay rent for such land. But subject to these few limitations, the rights of a rent-free holder are much higher than those of an occupancy raiyat and it could not be the policy of the Legislature to saddle such tenant with all the restrictions and disabilities of an occupancy raiyat, simply because, in addition to his rent-free right, he has acquired the status of an occupancy raiyat.

6. An argument may be founded on behalf of the petitioner upon the provisions of Section 26H, Ben. Ten. Act, which is now repealed by Bengal Act, 6 of 1938. That section provided a fixed landlord's fee in case of a transfer of a rent-free holding of an occupancy raiyat. This was necessary because of the old Section 26D which provided various methods for calculating the landlord's transfer fees as laid down in Section 260 and the landlord it appears got a very substantial share of the value of the transferred holding whichever method of calculation came into operation. u/s 26H, however, the landlord got a fixed nominal fee of Rs. 2 whatever the value of the holding might be and this was to be paid in the manner provided in Sections 12 and 13, Ben. Ten. Act. The intention of the Legislature, it appears, was to place the rent-free holding of a raiyat on the same footing as a rent-free tenure and it is difficult to say from the provisions of Section 26H, Ben. Ten. Act, that the Legislature intended that a rent-free holding should be subject to all the provisions relating to pre-emption as an ordinary occupancy holding.

7. In the case before us the settlement records describe the tenants with regard to these two holdings in the following manner : "Settled raiyat enjoying niskar right by long possession and enjoyment" and the same description occurs in the kobalas that were executed by the cosharer tenants. It appears therefore that there was no grant forthcoming in this case but a grant was presumed from the fact that the tenant was in occupation for a long period of time without payment of any rent to the landlord. In such cases the proper legal inference is that the tenancy was a rent-free one in its very inception. In our opinion, Sections 23A to 38, Ben. Ten. Act, are applicable when the tenancies are occupancy holdings pure and simple but they have no application when the tenant has higher rights in the land under an express or implied grant from the landlord, though such rights are combined with those of an occupancy raiyat acquired under express provisions of the Act. To hold otherwise would be to nullify the grant altogether.

So even if we hold that a niskar raiyat is not exactly a raiyat at fixed rate, we think that the provisions of 9. 26F, Ben, Ten, Act, have no application in his case. We hold therefore that the view taken by the Court below is right and the claim for preemption made by Hirendra in respect of the two niskar holdings must fail. These two rules are also discharged. No order as to costs.

Blank, J.

8. I agree.